Supreme Court, U.S.
FILED

991144 JAN 04 2000

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

CLEOPATRA McDOUGAL-SADDLER,

Petitioner,

versus

ALEXIS M. HERMAN, Secretary, U.S. DEPARTMENT OF LABOR

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR CERTIORARI

Michael L. Meketon, Esquire
840 Earp Street
Philadelphia, PA 19147
(215) 755-3259

Jeffrey P. Zeelander, Esquire
Counsel of Record
1608 Walnut Street, Suite 1300
Philadelphia, PA 19103
(215) 545-2132

Curry & Taylor (202) 393-4141/ussupremecourt@hotmail.com

QUESTIONS FOR REVIEW

Does 5 U.S.C. § 8128(b), the "door-closing" provision of the Federal Employees Compensation Act ("FECA"), preclude federal question jurisdiction over a declaratory judgment action challenging a written policy of the Secretary of Labor that plainly violates a clear statutory mandate granted by Congress to FECA claimants? The Third Circuit's conclusion is in conflict with the four Circuits that have already reviewed this issue.

Does 5 U.S.C. § 8123(a) contain a clear statutory mandate that the Secretary of Labor has lawlessly disregarded?

TABLE OF CONTENTS

PAGE

Questions Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdictional Statement 1

Relevant Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations Involved ... 1

Statement of the Case 2

Reasons for Granting the Writ 4

A.The Panel Decision Authorizes Lawless Action B the Secretary of Labor. 4

B. The Panel Opinion Conflicts With The Precedent of Four Circuits. 6

C. The Panel Decision Defies U.S. Supreme Court Reviewability Case Law 7

D. An Important Reviewability Question Is Posed. 10

E. The Question Is of Exceptional Importance to Federal Workers 11

Conclusion 12

Appendix

Decision of the Circuit Court 1a

Decision of the District Court 18a

Decision of the Circuit Court 38a

Order Denying Rehearing 48a

TABLE OF AUTHORITIES

CASES:	PAGE
Block v. Community Nutrition Inst., 467 U.S. 340 (1984);	7
Board of Governors v. Mcorp Financial, Inc., 502 U.S. 32, 43-44 (1991)	11
Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667, 672 (1986), ...	7
Brumley v. United States Dep't of Labor, 28 F.3d 746 (8th Cir.1994), *cert. denied*, 513 U.S. 1082 (1995):	6
Czerkies v. United States Dept. of Labor, 73 F.3d 1435, 1441 (7th Cir. 1996) (.....	10
Dunlop v. Bachowski, 421 U.S. 560, 567 (1975). ..	7
Hanover v. Reich, 82 F.3d 1304 (4th Cir. 1996). ...	6
Johnson v. Robinson, 415 U.S. 361, 370 (1974) ...	9
Marbury v. Madison, 5 U.S. 137, 163 (1803)	7
Oestereich v. Selective Serv. Sys., 393 U.S. 233, 238 (1968)	11

Paluca v. Secretary of Labor, 813 F.2d 524 (1st Cir. 1987), *cert. denied sub nom.*,484 U.S. 943, 98 L. Ed. 2d 355, 1987, 108 S. Ct. 328, (1987) 6

Roberts v. Secretary of Labor, 484 U.S. 943 (1987). 6

Staacke v. United States Sec. of Labor, 841 F.2d 278 (9th Cir. 1988); 6

Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1993). 7

Traynor v. Turnage, 485 U.S. 535, 544 (1988) ... 9

United States v. Lorenzetti, 467 U.S. 167, 167, 174-75 n.3 (1984) 3

Woodruff v. United States Dep't of Labor, 954 F.2d 634 (11th Cir. 1992) 6

STATUTES:

5 U.S.C. § 771 (1964) 3

5 U.S.C. § 8101 *et seq* 1, 2, 11

5 U.S.C. § 8123(a) ..... *passim*

5 U.S.C. § 8128(b) ..... *passim*

28 U.S.C. § 1254(1). 1

OTHER AUTHORITIES:

1966 U.S. Code Cong. & Admin. News 767 3

1998 STATISTICAL ABSTRACT OF THE UNITED STATES table. 531, p. 331 (Oct. 1998). 11

OWCP ANNUAL REPORT TO CONGRESS: FY 1996 (1997) 11

S. Rep. No. 421, 79th Cong., 1st sess. 2 (1945). .. 8

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit filed July 2, 1999 is set forth in the Appendix at p. 1a and is reported at 184 F.3d 207. The decision of the United States Court of Appeals for the Third Circuit filed November 17, 1998 is set forth in the Appendix at p. 18a The opinion of the United States District Court for the Eastern District of Pennsylvania dated December 24, 1997 is set forth in the Appendix at p. 38a. These decisions are unreported.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

Jurisdiction is provided by 28 U.S.C. § 1254(1). The United States Court of Appeals for the Third Circuit issued a decision in this case on November 17, 1998. Panel rehearing was requested and the panel vacated its decision dated November 17, 1998. Subsequently, the United States Court of Appeals for the Third Circuit issued a decision in this case on July 2, 1999. Rehearing *en banc* was timely requested. Rehearing was denied on October 6, 1999. This Petition was timely filed within 90 days of that denial and is thus timely.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

5 USC § 8128(b) Review of award

(b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter [5 USCS §§ 8101 et seq.] is--

(1) final and conclusive for all purposes and with respect to all questions of law and fact; and

(2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 USC § 8123(a) Physical examinations

(a) An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by him present to participate in the examination. If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.

STATEMENT OF THE CASE

This is a case involving the Federal Employees Compensation Act ("FECA"), 5 U.S.C. § 8101 *et seq,* the workers' compensation law for federal employees. FECA is administered by the Secretary of Labor through the Office of Workers' Compensation Programs ("OWCP").

FECA contains a provision at 5 U.S.C. § 8123(a) that mandates the appointment of a duly qualified third physician (a tie-breaker) "in case of any [1]. . disagreement between the

[1]The word "any" was inexplicably dropped in the 1966 restatement of Title 5. Compare 5 U.S.C. § 771 (1964) with 5 U.S.C.

physician making the examination on the part of the United States and the employee's physician." In this provision of FECA, the 1916 Congress created an unusual and elegant solution to the vexing problem faced in all types of injury compensation systems: how are the medical cause and extent of injuries decided when there is disagreement amongst the medical evaluators? Usually, workers' compensation and other injury programs vest this authority in a fact-finder who evaluates the various medical opinions and reaches a conclusion; the 1916 Congress vested this power with physicians. In 1983, the Secretary of Labor administratively removed this provision from FECA.

The termination of petitioner McDougal-Saddler's FECA benefits was affirmed at the highest level of review afforded under FECA in a decision that explicitly denied her the statutorily mandated protection of the "third physician". This was accomplished using a "weighing the medical evidence" policy that reversed seventy years of adherence to the statute. According to the Secretary, the goal of this weighing of the evidence policy is "returning more employees to duty" and "reducing the compensation costs of Federal agencies." Under this policy, the Secretary may discount the weight of the opinion of the FECA claimant's physician, may determine that the contrary finding of the Secretary's selected doctor is superior in quality and force, and may then terminate or simply reject a claim based on the

---

§8123 (a)(1994). The revision promised to effect no substantive changes. See Act of Sept. 6, 1966, § 7(a), 89 Stat. 631, reprinted in 1966 U.S. Code Cong. & Admin. News 767. This Court has explained that in this circumstance the statutory provision must be read as if the word was never dropped. *See United States v. Lorenzetti*, 467 U.S. 167, 167, 174-75 n.3 (1984)(giving no effect to omission by the codifiers of the word "therefor" from provision of FECA).

"weight" of the evidence. This policy ignores the statutory requirements of 5 U.S.C. § 8123(a).

Ms. McDougal-Saddler challenged this policy by means of a declaratory judgment action in the Eastern District of Pennsylvania, utilizing federal question jurisdiction. She asserted that FECA, in 5 U.S.C. §8123(a), plainly prohibits the weighing policy when there is "any disagreement" between the claimant's and the government's medical experts. The district court found no violation of a clear statutory mandate. The court of appeals [hereafter "Panel Decision"], relying upon the FECA reviewability clause, 5 U.S.C. § 8128(b), found that it could not review a Labor policy that violates an important procedural right that FECA grants in clear statutory terms to federal workers.

REASONS FOR GRANTING THE WRIT

A. The Panel Decision Authorizes Lawless Action By the Secretary of Labor.

The Panel Opinion fails to recognize the implications of the precedent it sets. It twice admits that the Secretary has likely violated the statute: "Notwithstanding the explicit language of § 8123(a) ... OWCP [Office of Workers Compensation Programs] weighs the medical reports when determining whether to appoint a third physician." [8a]; and "It is difficult to square this weighing process with the § 8123(a) mandate ..." [8a]. Yet in denying declaratory judgment review of a Labor policy that conflicts with plain statutory commands, the Panel Decision shuts the door on any judicial inspection of the legality of the Secretary's regulations and policies. In effect, it has Congress saying, through the ambiguous language found in § 8128(b); "Here

are many statutory rules and orders that you may follow, if you think it convenient."

The Secretary's weighing process was instituted in 1983 as a cost savings measure. Time and expense could be saved in the adjudication of FECA claims by dispensing with the appointment of an independent doctor as a tie-breaker. Never mind that Congress instructed that the Secretary "shall appoint" a "third physician" in case of "any disagreement" between claimant's and the government's doctors; instead, OWCP lay-examiners simply "weigh" the relative strengths of the competing medical opinions and act as tie-breakers themselves. The 1916 Congress instructed that any determination of medical issues shall be left to physicians, the Secretary of Labor revised FECA and the result is that only sometimes does a third-physician resolve medical issues. According to the Panel Decision, the door-closing provision of FECA allows this type of lawless agency action to escape review. It is extremely difficult to envision that this is the type of absolute and unreviewable power that Congress granted the Secretary of Labor.

Based upon the Panel Decision, the Secretary's actions in a FECA claim cannot be limited by **any** Court, let alone the plain language of the statute. For budgetary reasons, political reasons, or to merely satisfy a personal whim, according to the Panel Decision, the Secretary may revise or disregard any provision of FECA that she chooses. Perhaps the Secretary will decide to eliminate postal or judicial workers from the FECA program. What authority limits her power? Under the Panel Decision, none.

This strikes petitioner as a truly extraordinary federal administrative program, previously unknown in American

history, in which an agency is delegated full power to restructure as it wishes a detailed statutory program. It is quite frightening to think that this could possibly be the wish of Congress.

This Honorable Court must grant this Petition for Certiorari so that appropriate judicial control can be asserted over the Secretary of Labor's lawless administration of an important federal benefits program.

B. The Panel Opinion Conflicts With The Precedents of Four Circuits.

Four U.S. Courts of Appeal have assumed jurisdiction to review FECA policies against a claim that the policies violated clear statutory mandates. *See Staacke v. United States Sec. of Labor*, 841 F.2d 278 (9th Cir. 1988); *Woodruff v. United States Dep't of Labor*, 954 F.2d 634 (11th Cir. 1992); *Brumley v. United States Dep't of Labor*, 28 F.3d 746 (8th Cir.1994), *cert. denied*, 513 U.S. 1082 (1995): *Hanover v. Reich*, 82 F.3d 1304 (4th Cir. 1996). Although none found on the merits for the FECA claimant, each Circuit asserted jurisdiction and did decide whether the Secretary had violated a clear statutory mandate. This renders inexplicable the Panel Opinion's classification of these holdings as "dicta." [17a (fn.2),31a]. The Panel Opinion joins only one other circuit in denying judicial power to correct plain illegalities of the Secretary in the FECA program. *See Paluca v. Secretary of Labor*, 813 F.2d 524 (1st Cir. 1987), *cert. denied sub nom.*,484 U.S. 943, 98 L. Ed. 2d 355, 1987, 108 S. Ct. 328, (1987): *Roberts v. Secretary of Labor*, 484 U.S. 943 (1987).

This Honorable Court must grant this Petition for Certiorari so that the Court can resolve the conflict amongst

the U.S. Courts of Appeal concerning the scope of the door-closing provision found at 5 U.S.C. § 8128(b).

C. The Panel Decision Defies U.S. Supreme Court Reviewability Case Law

No Supreme Court precedent examines whether the door-closing provision at § 8128(b) prohibits judicial review of Labor's FECA policy for violations of statutory mandates. But the Court's precedents do instruct lower courts on the required analysis.

The agency seeking to avoid judicial review carries a "heavy burden" to overcome "the strong presumption that Congress did not mean to prohibit all judicial review." *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 672 (1986), *quoting Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975). The presumption and correlative burden derive from "[T]he right of every individual to claim the protection of the laws," being "the very essence of civil liberty." *Marbury v. Madison*, 5 U.S. 137, 163 (1803) (John Marshall, C.J.). To discharge this burden, the agency must demonstrate that five elements combine to demonstrate Congress' desire to cut off review: the reviewability statutory language, the structure of the statutory scheme, the statute's objectives, the legislative history, and the nature of the administrative action involved. *See, e.g., Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1993). The court must also ask "whether the claims can be afforded meaningful review." *Thunder Basin Coal Co. v. Reich*, *supra* at 207.

The Panel Opinion completely disregarded this methodology; indeed, it did not even point to the statutory

words that it believed, incorrectly, shut off review. Had it obeyed the Court's dictates, the Panel would have decided in favor of review.

First, the clause dealing with judicial review, 5 U.S.C. § 8128(b), reads:

> [T]he action of the Secretary or his designee in allowing or denying a payment is – (1) final and conclusive for all purposes with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a Court by mandamus or otherwise.

The clause only specifically limits review of "action ... in allowing or denying a payment." There is nothing limiting a challenge to a policy, let alone a policy that clearly violates a statutory mandate. The section's focus is not upon every action of the Secretary whatsoever, but rather, to repeat, only "the action ... in allowing or denying a payment." These words are not broad enough to cover her actions in issuing rules and policies that fundamentally change the meaning and effect of statutory provisions.

Section 8128(b) originated in the Act of July 28, 1945, § 4, P.L. 161, 59 Stat. 503-04; S. Rep. No. 421, 79th Cong., 1st sess. 2 (1945). At the time there was an effort to resolve the claims of foreign nationals who had assisted the American war effort around the world. There was considerable concern to resolve these claims in an expeditious manner. For this reason, Congress limited judicial review of fact and law findings concerning the claims of such foreign nationals. Please notice the huge gap

between §8128(b)'s original purpose and its application herein to bar a challenge to a Department of Labor policy applied here in the United States to the detriment of an injured American citizen working in Philadelphia.

Had the Panel Opinion paid close attention to the statutory words, it would have seen this case as controlled by Court precedents which read reviewability clauses in benefit statutes as precluding judicial review only of individual benefit decisions and not of across-the-board policies. *See Johnson v. Robinson,* 415 U.S. 361, 370 (1974) (veterans' benefits non-review clause aimed at unburdening courts from flood of small claims challenging the merits of individual compensation decisions); *Traynor v. Turnage*, 485 U.S. 535, 544 (1988) (testing VA regulation for statutory violation does not violate purpose of non-review provision).

Second, the Panel Decision fails to discuss how declaratory judgment actions like McDougal-Saddler's would interfere with objectives and functioning of FECA. This too would have cut against its decision. This is a case that challenges an across-the-board policy of the Secretary of Labor that flatly contravenes an express mandate of Congress. This is not a "nickel and dime" appeal of the Secretary's findings of fact or application of law in a FECA determination. An occasional lawsuit challenging a DOL regulation or policy issuance would not hamper the statute's administration.

Third, the statute's objectives --providing income security for federal workers and their families -- can hardly be furthered by vesting a "rewrite" power in the Secretary of Labor, particularly when budget concerns are foremost in the Secretary's mind.

Fourth, § 8128(b) is not a paradigm of congressional deliberation. Analysis of § 8128(b) reveals that it originated as a clause concerning the disposition of FECA claims by foreign nationals following the close of World War II and was never expanded. Inexplicably, the 1966 codifiers of Title 5 appear to have accidentally elevated this clause to its current prominence. *See Czerkies v. United States Dept. of Labor,* 73 F.3d 1435, 1441 (7th Cir. 1996) (Posner, C.J.; provision "may well have been an accident").

Fifth, as detailed above, the nature of the administrative action sought here to be reviewed is basic FECA policy, not a run-of-the-mill benefit determination.

Finally, without judicial review, petitioner McDougall-Saddler will have lost statutory benefits without having been afforded the opportunity Congress gave her to prove her entitlement and *will be absolutely without means of legal redress.*

Petitioner urges that certiorari be issued so that appropriate judicial control can be asserted over the Secretary of Labor's administration of an important federal benefits program.

D. An Important Reviewability Question Is Posed.

Under what circumstance is a statutory provision read as precluding any judicial review whatsoever of the lawfulness of agency policy, even though the application of such policy lawlessly deprives an individual of rights granted by Congress? This is the important legal question posed by *McDougal-Saddler.*

When the Court has shut off review, it has been careful to note that alternative remedies existed for judicial relief. *See, e.g., Board of Governors v. Mcorp Financial, Inc.*, 502 U.S. 32, 43-44 (1991) (stating "FISA expressly provides Mcorp with a meaningful and adequate opportunity for judicial review ... an unquestioned right to review of both the regulation and its application."). *Compare Oestereich v. Selective Serv. Sys.*, 393 U.S. 233, 238 (1968) ("unnecessary harshness" to construe statute as requiring draftee to defend himself by habeas or as a criminal defense).

Petitioner urges that certiorari be issued as the Panel Opinion leaves her without any remedy.

E. The Question Is of Exceptional Importance to Federal Workers

The United States Government has 2,895,000 employees. *See* 1998 STATISTICAL ABSTRACT OF THE UNITED STATES table. 531, p. 331 (Oct. 1998). FECA affords them economic security. The vast bulk of these workers are protected against wage loss caused by job-related injuries, diseases, and death by virtue of that statute. *See* 5 U.S.C. § 8101 (1)(A)-(E) (defining covered "employee"). Each year about 180,000 employees file FECA claims. *See* OWCP ANNUAL REPORT TO CONGRESS: FY 1996 (1997) at table A-2, p. 43. Each of these disability claims is subject to the "weighing of the medical evidence" policy that McDougal-Saddler is attempting to challenge in this case and which the Panel Decision admitted was likely illegal.

It is to do justice for large numbers of future FECA claimants that certiorari must issue in this case and the Panel Opinion be ultimately reversed.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the petition for certiorari be granted.

Respectfully Submitted,
Jeffrey P. Zeelander, Esquire
Counsel of Record
1608 Walnut Street, Suite 1300
Philadelphia, PA 19103
(215) 545-2132

Michael L. Meketon, Esquire
840 Earp Street
Philadelphia, PA 19147
(215) 755-3259

(any footnotes trail end of each document)

184 F.3d 207

CLEOPATRA McDOUGAL-SADDLER, Appellant v. ALEXIS M. HERMAN, Secretary, U.S. Department of Labor, Appellee

No. 98-1068

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

October 8, 1998, Argued

July 2, 1999, Filed

COUNSEL:

Jeffrey P. Zeelander [Argued], Philadelphia, PA.

Richard B. Cappalli, Klein Hall, Philadelphia, PA Counsel for Appellants.

Karen B. Kracov [Argued], Assistant United States Attorney, Michael R. Stiles, United States Attorney James G. Sheehan, Assistant United States Attorney, Chief, Civil Division, Nadine M. Overton, Assistant United States Attorney, Philadelphia, PA Counsel for Appellees.

JUDGES:

Before: McKEE, RENDELL, Circuit Judges, and DEBEVOISE, Senior District Judge *

OPINIONBY:
DICKINSON R. DEBEVOISE

OPINION:

OPINION OF THE COURT

DEBEVOISE, Senior District Judge:
Appellant, McDougal-Saddler, appeals the district court's order granting the motion of Cynthia Metzler, Acting Secretary, United States Department of Labor ("DOL")[1] to dismiss the complaint for lack of subject matter jurisdiction. We have jurisdiction over this appeal pursuant to *28 U.S.C. § 1291.* In an earlier opinion we affirmed the district court on the ground that McDougal-Saddler lacked standing to bring this action. Upon her petition for panel rehearing we vacated that opinion and asked for supplemental briefing.

We will now affirm, holding that by virtue of *5 U.S.C. § 8128*(b) the district court did not have jurisdiction.

I. The Facts

On May 14, 1982 McDougal-Saddler, then a 39-year old U.S. Postal Service distribution clerk, filed a claim with the Office of Workers' Compensation Program ("OWCP") for an injury to her back, upper neck and shoulder sustained on May 8 when handling trays of mail. On June 24 the OWCP began payment of compensation for temporary total disability. Dr. David S. Schwartz, a Board-certified internist and cardiologist, began treating McDougal-Saddler on August and diagnosed cervical and lumbosacral strains. He found his patient to be totally disabled.

After a February 1985 fitness-for-duty evaluation, McDougal-Saddler was offered and accepted reemployment as a distribution clerk with limited duties. She returned to work on March 31, 1985 but again stopped working on April 5, stating that because of pain in her neck, shoulder, arm and back she could not continue. Dr. Schwartz examined her the next day; he diagnosed cervical and lumbar strain and stated she was totally disabled.

On May 7, McDougal-Saddler filed a claim for a traumatic injury to her neck, shoulders and upper and lower back sustained on April 5 when casing mail. On May 20 the OWCP again began payment of compensation for temporary total disability. In a June 17, 1985 report Dr. Schwartz diagnosed cervical radiculopathy. In a May 22, 1986 report he diagnosed chronic pain syndrome including chronic lumbosacral strain and chronic cervical strain. In an April 10, 1987 report Dr. Schwartz wrote, "Because of chronic debilitating pain and limited range of motion due to muscle stiffness and spasm, despite intensive physical therapy and medication, [McDougal-Saddler] is totally disabled from work at this time and for the near indefinite future."

The OWCP referred McDougal-Saddler to Dr. William H. Simon, a Board-certified orthopedic surgeon for a second opinion. In a May 4, 1987 report Dr. Simon diagnosed cervical and lumbar discogenic syndrome with cervical and lumbar nerve root irritation. He concluded that "there is no evidence that she sustained any acute injury that is responsible for this but that she has a slowly developing degenerative condition which limits the amount of work that she can do."

On December 31, 1987 the OWCP notified McDougal-Saddler that it proposed to terminate her compensation on the ground that her disability resulting from her employment injuries had ceased. In response McDougal-Saddler submitted another report of Dr. Schwartz in which he stated that her symptoms were "specifically due" to her May 8, 1982 injury and that her April 5, 1985 injury "added to her previous cervical and lumbosacral strain."

Effective November 20, 1988 the OWCP terminated McDougal-Saddler's compensation on the ground that the weight of the medical evidence established that her disability from her employment injuries ceased by that date. After a hearing an OWCP hearing representative found in a February 21, 1989 decision that McDougal-Saddler had not been afforded due process because she had not been provided with a copy of Dr. Simon's May 4, 1987 report. The hearing representative remanded the case for reinstatement of compensation and a re-evaluation by Dr. Simon.

At Dr. Simon's request a Board-certified radiologist performed a computerized tomography scan of McDougal-Saddler's lumbosacral and cervical spine. On the basis of the resulting report Dr. Simon revised his original opinion, stating in a November 15, 1989 report, "we now have objective evidence that this patient has cervical discogenic abnormalities beyond degenerative changes both in her neck and back."

Based on the entirety of the reports which had been submitted to it, the OWCP found that there was a conflict of medical opinion. On October 22, 1991, it referred the case to Dr. John T. Williams, a Board-certified orthopedic surgeon, to resolve

the conflict. The OWCP purported to act pursuant to the provisions of *5 U.S.C. § 8123*(a), which provides: "If there is disagreement between the physician making the examination for the United States [Dr. Simon] and the physician of the employee [Dr. Schwartz], the Secretary shall appoint a third physician who shall make an examination." According to the Federal (FECA) Procedure Manual, "The [Employees' Compensation Appeals Board] has stated that 'an impartial specialist's report is entitled to greater weight than other evidence of record as long as his conclusion is not vague, speculative or equivocal and is supported by substantial medical reasoning'." Part Two, Chapter 2-810.11 c.(2).

Dr. Williams conducted a physical examination of McDougal-Saddler, reviewed the medical records and in a March 4, 1992 report stated, among other things, that "what we are seeing here is the progression of degenerative joint and degenerative disc disease over a period of approximately seven years secondary to the normal wear and tear on the body and the aging process. The work-related injury did not cause the degenerative pathology first noted in 1987."

The OWCP terminated McDougal-Saddler's compensation on September 20, 1992, concluding that the weight of the medical evidence, represented by Dr. Williams's reports, established that the effects of her April 5, 1985 and May 11, 1982 injuries had ceased. On appeal an OWCP hearing representative found in a November 24, 1993 decision that the opinion of Dr. Williams, the impartial medical specialist, resolved the conflict of medical opinion and established that the effects of the 1982 and 1985 injuries had ceased by September 20, 1992. By letter dated February 27, 1995 McDougal-Saddler requested reconsideration, contending,

among other things, that Dr. Williams was not an impartial medical specialist entitled to special weight because Dr. Simon's November 15, 1989 report did not conflict with the conclusions of Dr. Schwartz. The OWCP denied the request for reconsideration, and McDougal-Saddler appealed to the Employees' Compensation Appeals Board ("ECAB").

The ECAB authored a detailed opinion. It weighed the evidence which had been developed during the years following McDougal-Saddler's original injury in May 1982. It contrasted the qualifications of Drs. Williams and Schwartz and analyzed the basis and reasoning of their respective reports. It found "that the weight of the medical evidence establishes that [McDougal-Saddler's] disability related to her May 8, 1982 and April 5, 1985 employment injuries ended by September 20, 1992."

The ECAB, however, agreed with McDougal-Saddler's contention that Dr. Williams was not an impartial medical specialist because at the time of his appointment there was no conflict of medical opinion.

The consequence which the ECAB attributed to the denial of impartial medical specialist status to Dr. Williams was ". . . the reports of Dr. Williams are thus not entitled to the special weight afforded to the opinion of an impartial medical specialist resolving a conflict of medical opinion . . ." The ECAB treated Dr. Williams's reports in the same manner as it treated the other medical evidence, giving it no special deference. It weighed the totality of the evidence and on March 20, 1996 affirmed the decision of the OWCP. Thereafter it denied a petition for reconsideration.

McDougal-Saddler contends that the procedures leading to the denial of her benefits were in violation of the clear mandate of *5 U.S.C. § 8123*(a) which provides in relevant part:

> If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary **shall appoint a third physician who shall make an examination**.

(emphasis added).

This mandate is implemented by regulation:

> If there should be disagreement between the physician making the examination on the part of the United States and the injured employee's physician, the Office **shall appoint a third physician, qualified in the appropriate specialty, who shall make an examination . . . .** (emphasis added).

20 C.F.R. § 10.408.

The ECAB's opinion held that Dr. Williams was not an impartial expert because there was no conflict of medical opinion at the time his opinion was sought. Thus the "disagreement between the physician making the examination for the United States and the physician of the employee" arose at the time Dr. Williams rendered his opinion.

Notwithstanding the dictate of § 8123(a), the ECAB did not require appointment of "a third physician". Instead it weighed the evidence before it, affirmed the decision of the OWCP terminating compensation and later denied a petition for reconsideration.

Notwithstanding the explicit language of § 8123(a) and implementing regulations, OWCP weighs the medical reports when determining whether to appoint a third physician. In its Federal (FECA) Procedural Manual and in practice, according to McDougal-Saddler, OWCP appoints a third physician only "where the analysis of the evidence demonstrates conflicting opinions or conclusions which are supported almost equally." Generally "careful analysis of the medical evidence should allow for resolution of most issues without resorting to a referee or 'impartial' specialist." (Federal (FECA) Procedure Manual, Part Two, Chapter 2-810-11 a, App. 53).

It is difficult to square this weighing process with the § 8123(a) mandate that "if there is disagreement [between the government and employee physicians] the Secretary shall appoint a third physician." (emphasis added).

McDougal-Saddler filed in the district court a complaint and petition for declaratory and injunctive relief, alleging that DOL has adopted procedures that violate the statutory directive regarding the appointment of a third physician.

II. The District Court Opinion

The DOL moved to dismiss McDougal-Saddler's complaint for lack of subject matter jurisdiction, relying on *5 U.S.C. § 8128*(b) which provides:

> (b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is--
> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

McDougal-Saddler urged in opposition to the motion to dismiss that two exceptions to the prohibition on judicial review applied. She asserted that the bar did not apply because she presented evidence of a cognizable constitutional violation. She asserted further that the bar did not apply because the actions of the DOL violated a clear statutory mandate.

The district court rejected McDougal-Saddler's constitutional claims. It held that FECA PM 2-810-11a providing for a weighing of the medical evidence before appointing a third physician was simply an interpretive rule clarifying the word "disagreement" in § 8123(a) and therefore did not require public notice or a public comment period to be valid. Its application to McDougal-Saddler did not violate her due process rights or otherwise create a cognizable constitutional claim. McDougal-Saddler does not challenge this ruling in her appeal.

The district court assumed for the purposes of its decision that a violation of a clear statutory mandate creates subject

matter jurisdiction for a court to hear a case brought under FECA. It found, however, that because the ECAB interpretation was plausible, there was no such violation, holding:

> The Court concludes that FECA PM 2-810 instructs claims examiners in how to determine whether a "disagreement" between physicians exists, and that defendant's interpretation of *5 U.S.C. § 8123*(a), using FECA PM 2-810, is plausible. Under that interpretation, it was appropriate for ECAB to decide plaintiff's claim based on the weight of the medical evidence. ECAB did not violate a clear statutory mandate in evaluating plaintiff 's claim. The statute did not, under the facts presented, require ECAB to remand the case for the appointment of an independent physician to conduct an examination of plaintiff.

The court granted DOL's motion to dismiss.

III. Discussion

The statutory provision at issue here provides that "the action of the Secretary or his designee in allowing or denying a payment is - (1) final and conclusive for all purposes with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a Court by mandamus or otherwise." *5 U.S.C. § 8128*(b). Although Congress is ordinarily presumed to have intended judicial

review of agency action, "Congress is absolutely free to limit the extent to which it consents to suit" against the United States or its instrumentalities. *Clinton County Comm'rs v. United States E.P.A., 116 F.3d 1018, 1025 (3d Cir. 1997)* cert. denied sub nom. *Arrest the Incinerator Remediation (A.I.R.), Inc., 522 U.S. 1045, 118 S. Ct. 687. 139 L. Ed. 2d 633 (1998).*

The starting point for the determination of Congress's intent is the language of the statute. See *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc., 101 F.3d 1492, 1498 (3d Cir. 1996).* In the present case there can hardly be plainer language than that which § 8128(b) employs. The Supreme Court has referred to § 8128(b) as an example of language that Congress uses when it "intends to bar judicial review altogether." *Lindahl v. Office of Personnel Management, 470 U.S. 768, 779-780, 105 S. Ct. 1620, 84 L. Ed. 2d 674 (1985).*

The question whether a statute precludes judicial review "is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Block v. Community Nutrition Institute, 467 U.S. 340, 345, 104 S. Ct. 2450, 81 L. Ed. 2d 270 (1984).* Both McDougal-Saddler and the DOL have reviewed the legislative history of FECA and in particular the evolution of § 8128(b). Each side argues that the legislative history supports its position.

In *Czerkies v. United States Dep't of Labor, 73 F.3d 1435 (7th Cir. 1996),* Chief Judge Posner examined the same history and found that it "reveals the limited scope of the

door-closing provision." *Id. at 1440,* and that adoption of the provision "may well have been an accident." *Id. at 1441.* That case, however, concerned a constitutional challenge to action of the DOL. The court held that "the history of the Federal Employees Compensation Act provides no basis for rebutting the presumption of judicial review of constitutional claims. It is distasteful to suppose that an administrative agency would claim to receive from Congress by sheer inadvertence a license to ignore the Constitution." *Id. at 1441.* Although the district court had jurisdiction to hear Czerkies' constitutional claim, the Supreme Court affirmed the judgment dismissing the suit because the constitutional claim was insubstantial.

Unlike Czerkies the present appeal does not involve a constitutional claim. The district court held that adoption and compliance with the provisions in the procedural Manual providing for a weighing of the medical evidence did not violate McDougal-Saddler's due process rights or otherwise create a cognizable constitutional claim. McDougal-Saddler does not challenge that conclusion on this appeal, and we are not required to decide whether § 8128(b) would deprive a district court of jurisdiction to hear such a claim.

It is necessary to decide whether an asserted violation of a clear statutory mandate constitutes a second exception to the statutory bar. We conclude that there is nothing in the legislative history which would permit a departure from the unequivocal language of § 8123(b) to review such an asserted violation, and that the decisions of our court preclude such a departure.

McDougal-Saddler relies primarily upon two United States Supreme Court cases, *Oestereich v. Selective Serv. Sys., 393*

U.S. 233, 89 S. Ct. 414, 21 L. Ed. 2d 402 (1968) and *Leedom v. Kyne, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958).* In Oestereich the draft law gave a "plain and unequivocal" service exemption to students preparing for the ministry. Notwithstanding the exemption, Oestereich's draft board reclassified him 1-A as a form of discipline when he returned his registration certificate to protest the Vietnam War. Oestereich brought suit in the United States District Court to restrain his induction. Unambiguously § 10(b)(3) of the Military Service Act of 1967 provided that "No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction . . .." The Court declined to apply § 10(b)(3) literally, holding that "since the exemption granted divinity students is plain and unequivocal . . . pre-induction judicial review is not precluded . . . ." *393 U.S. at 238-239.*

In Leedom the National Labor Relations Board included both professional and nonprofessional employees in a collective bargaining unit in clear violation of the National Labor Relations Act. The association representing the professional employees brought suit in the United States District Court challenging the NLRB's action. The NLRA permitted judicial review of a Board certification order by a petition for enforcement or review of an order made under § 10(c) of the Act restraining an unfair labor practice; the Board argued that its order was not otherwise subject to judicial review. The Court held that the review provisions of the NLRA did not preclude an action "to strike down an order of the Board

made in excess of its delegated powers and contrary to a specific prohibition in the Act." *358 U.S. at 188.*

More recent decisions of the Supreme Court and of our Court establish that Oestereich has not been extended beyond its particular facts and that the Kyne "clear statutory mandate" exception will not be applied when the statute provides clear and convincing evidence that Congress intended to deny district court jurisdiction. In *Board of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32, 112 S. Ct. 459, 116 L. Ed. 2d 358 (1991),* MCorp sought to enjoin administrative proceedings instituted against it by the Federal Reserve Board on the ground that the proceedings were in excess of the Board's authority. It relied upon the Kyne doctrine to overcome the statutory bar to district court jurisdiction. The Court advanced two reasons for applying the statutory bar notwithstanding a claim of violation of a clear statutory mandate. First, MCorp had an alternative means of review. Second:

> . . . [a] related factor distinguishing this litigation from Kyne is the clarity of the congressional preclusion of review in FISA. In Kyne, the NLRB contended that a statutory provision that provided for judicial review implied, by its silence, a preclusion of review of the contested determination. By contrast, in FISA Congress has spoken clearly and directly: "No court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order under this section." *12 USC § 1818*(i)(1) (1988 ed,

> Supp II) [*12 USCS § 1818*(i)(1)] (emphasis added). In this way as well, this litigation differs from Kyne.

Viewed in this way, Kyne stands for the familiar proposition that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner, 387 U.S. 136, 141, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967).* As we have explained, however, in this case the statute provides us with clear and convincing evidence that Congress intended to deny the District Court jurisdiction to review and enjoin the Board's ongoing administrative proceedings.

502 U.S. at 44 (footnote omitted).

In *Hindes v. F.D.I.C., 137 F.3d 148, 164 (3d Cir. 1998),* we noted the "limited exception to a statute's withdrawal of jurisdiction where the plaintiff claims that the agency acted in a blatantly lawless manner or contrary to a clear statutory prohibition" and emphasized "that an integral factor in determining the applicability of the exception is the clarity of the statutory preclusion."

In Clinton County plaintiffs sued the United States Environmental Protection Agency ("EPA") to enjoin EPA from proceeding with a trial burn and incineration remedy. The district Court dismissed for lack of subject matter jurisdiction, citing statutory provisions precluding judicial review until EPA's remedial activities were completed. Rejecting plaintiffs' contention that under the Kyne doctrine violation of a clear statutory prohibition constituted an

exception to the statutory bar, we stated "subsequent cases have refined the Kyne doctrine. In *Briscoe v. Bell, 432 U.S. 404, 97 S. Ct. 2428, 53 L. Ed. 2d 439 (1977),* the Court held that jurisdiction to review agency action allegedly in excess of statutory authority cannot be inferred when language in the statute itself expressly forecloses judicial review . . . . More recently, in Board of Governors v. MCorp Financial, Inc., . . . the [Supreme] Court reiterated that a right to judicial review under Kyne may be inferred only if there is no clear statutory prohibition of such review." *116 F.3d at 1028-1029.*[2]

The language of § 8128(b) provides clear and convincing evidence that Congress intended to deny the district courts jurisdiction to review decisions of the DOL. The language is broad enough to include both policy or rule making decisions of the Secretary as well as individual benefit determinations. *Paluca v. Secretary of Labor, 813 F.2d 524, 527-28* (1st Cir.), cert. denied sub nom. *Roberts v. Secretary of Labor, 484 U.S. 943, 108 S. Ct. 328, 98 L. Ed. 2d 355 (1987).*

McDougal-Saddler seeks to distinguish MCorp, Hindes and Clinton County from the present case, arguing that (i) MCorp, the CERCLA case (Clinton County) and the FIRREA case (Hindes) each involves claims with language, history and function very different from those applicable in FECA cases and (ii) in MCorp, Hindes and Clinton County some form of relief was available in future proceedings. The principles of statutory construction set forth in those cases, however, are equally applicable here, regardless of the context. When a plaintiff seeks to rely upon the Kyne doctrine these circumstances are insufficient to overcome a clear statutory prohibition of judicial review such as § 8128(b).

IV. Conclusion

For the foregoing reasons, we will affirm the district court's order granting the DOL's motion to dismiss the complaint.

Footnotes

* Honorable Dickinson R. Debevoise, United States Senior District Judge for the District of New Jersey, sitting by designation.

[1] Alexis M. Herman is presently United States Secretary of Labor.

[2] In dicta four circuits have stated § 1331 jurisdiction exists to review claims that OWCP policy violated clear statutory commands. See *Staacke v. United States Secretary of Labor, 841 F.2d 278, 281-82 (9th Cir. 1988)*, citing *Oestereich v. Selective Serv. Sys., 393 U.S. 233, 89 S. Ct. 414, 21 L. Ed. 2d 402 (1968)* and *Leedom v. Kyne, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958)* (finding no clear statutory command); *Woodruff v. United States Dep't of Labor, 954 F.2d 634, 639-40 (11th Cir. 1992)*; (same); *Brumley v. United States Dep't of Labor, 28 F.3d 746 (8th Cir. 1994)*, cert. denied, *513 U.S. 1082, 115 S. Ct. 734, 130 L. Ed. 2d 637 (1995)* (same); *Hanauer v. Reich, 82 F.3d 1304, 1307-09 (4th Cir. 1996)*. These opinions, however, predate our Court's opinions in Hindes and Clinton County.

Filed November 17, 1998

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 98-1068
CLEOPATRA McDOUGAL-SADDLER
Appellant

v.

ALEXIS M. HERMAN, Secretary, U.S. Department of Labor,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (D.C. No. 97-cv-1908)

Argued October 8, 1998

Before: McKEE, RENDELL, Circuit Judges, and DEBEVOISE, Senior District Judge*

[Filed: November 17, 1998]

Jeffrey P. Zeelander [Argued] 1608 Walnut Street, Suite 1300 Philadelphia, PA 19103-5407

Richard B. Cappalli Klein Hall 1719 N. Broad Street Philadelphia, PA 19122

Counsel for Appellants

Karen B. Kracov [Argued] Assistant United States Attorney

Michael R. Stiles United States Attorney
James G. Sheehan Assistant United States Attorney Chief, Civil Division

Nadine M. Overton Assistant United States Attorney
615 Chestnut Street, Suite 1250 Philadelphia, PA 19106-4476

Counsel for Appellees

OPINION OF THE COURT

DEBEVOISE, Senior District Judge:

Appellant, McDougal-Saddler, appeals the district court's order granting the motion of Cynthia Metzler, Acting Secretary, United States Department of Labor ("DOL")1 to dismiss the complaint for lack of subject matter jurisdiction. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and will affirm, although for reasons different from those upon which the district court relied.

I. The Facts

On May 14, 1982 McDougal-Saddler, then a 39-year old U.S. Postal Service distribution clerk, filed a claim with the Office of Workers' Compensation Program ("OWCP") for an injury to her back, upper neck and shoulder sustained on May 8 when handling trays of mail. On June 24 the OWCP began payment of compensation for temporary total disability. Dr. David S. Schwartz, a Board-certified internist and cardiologist, began treating McDougal-Saddler on August and diagnosed cervical and lumbosacral strains. He found his patient to be totally disabled.

After a February 1985 fitness-for-duty evaluation, McDougal-Saddler was offered and accepted reemployment as a distribution clerk with limited duties. She returned to work on March 31, 1985 but again stopped working on April 5, stating that because of pain in her neck, shoulder, arm and back she could not continue. Dr. Schwartz examined her the next day; he diagnosed cervical and lumbar strain and stated she was totally disabled.

On May 7, McDougal-Saddler filed a claim for a traumatic injury to her neck, shoulders and upper and lower back sustained on April 5 when casing mail. On May 20 the OWCP again began payment of compensation for temporary total disability. In a June 17, 1985 report Dr. Schwartz diagnosed cervical radiculopathy. In a May 22, 1986 report he diagnosed chronic pain syndrome including chronic lumbosacral strain and chronic cervical strain. In an April 10, 1987 report Dr. Schwartz wrote, "Because of chronic debilitating pain and limited range of motion due to muscle stiffness and spasm, despite intensive physical therapy and medication, [McDougal-Saddler] is totally disabled from work at this time and for the near indefinite future."

The OWCP referred McDougal-Saddler to Dr. William H. Simon, a Board-certified orthopedic surgeon for a second opinion. In a May 4, 1987 report Dr. Simon diagnosed cervical and lumbar discogenic syndrome with cervical and lumbar nerve root irritation. He concluded:

> Her present findings are those of cervical and lumbar discogenic syndrome due to early degenerative disc disease in the cervical and lumbar spine. This is indicative

> of a genetic predisposition to degenerative disc disease and is not in my opinion due to any specific incidents of trauma occurring at work. . . There is no evidence that she sustained any acute injury that is responsible for this but that she has a slowly developing degenerative condition which limits the amount of work that she can do. She will have to decide whether she wishes to bear with the pain and continue her work or whether she wishes to retire from the work force.

On December 31, 1987 the OWCP notified McDougal-Saddler that it proposed to terminate her compensation on the ground that her disability resulting from her employment injuries had ceased. In response McDougal- Saddler submitted another report of Dr. Schwartz in which he stated that her symptoms were "specifically due" to her May 8, 1982 injury and that her April 5, 1985 injury "added to her previous cervical and lumbosocral strain."

Effective November 20, 1988 the OWCP terminated McDougal-Saddler's compensation on the ground that the weight of the medical evidence established that her disability from her employment injuries ceased by that date. After a hearing an OWCP hearing representative found in a February 21, 1989 decision that McDougal- Saddler had not been afforded due process because she had not been provided with a copy of Dr. Simon's May 4, 1987 report. The hearing representative remanded the case for reinstatement of compensation and a re-evaluation by Dr. Simon.

At Dr. Simon's request a Board-certified radiologist performed a computerized tomography scan of McDougal-Saddler's lumbosacral and cervical spine. On the basis of the resulting report Dr. Simon revised his original opinion, stating in a November 15, 1989 report, "we now have objective evidence that this patient has cervical discogenic abnormalities beyond degenerative changes both in her neck and back." He did not, however, attribute these discogenic abnormalities, as Dr. Schwartz did, to the 1982 and 1985 work incidents, and he disagreed with Dr. Schwartz's finding of total disability, stating, "I do think her discogenic abnormalities in her neck and back are enough to partially disable her but certainly not to totally disable her from returning to some form of work presuming that she is conditioned properly." Based on the entirety of the reports which had been submitted to it, the OWCP found that there was a conflict of medical opinion. On October 22, 1991, it referred the case to Dr. John T. Williams, a Board-certified orthopedic surgeon, to resolve the conflict. The OWCP purported to act pursuant to the provisions of 5 U.S.C. § 8123(a), which provides: "If there is disagreement between the physician making the examination for the United States [Dr. Simon] and the physician of the employee [Dr. Schwartz], the Secretary shall appoint a third physician who shall make an examination." According to the Federal (FECA) Procedure Manual, "The [Employees' Compensation Appeals Board] has stated that `an impartial specialist's report is entitled to greater weight than other evidence of record as long as his conclusion is not vague, speculative or equivocal and is supported by substantial medical reasoning'." Part Two, Chapter 2-810.11 c.(2).

Dr. Williams conducted a physical examination of McDougal-Saddler and in a January 21, 1992 report stated, among other things:

> On my physical examination today there are no positive objective findings to correlate to her complaints. I see no residual pathology as it relates to the injury of 1982 or 1985. I feel that she has recovered to the extent that she is able to be gainfully employed. She has degenerative changes in her cervical and lumbar spine which are compatible with her age and her type of body build. She is obese.
>
> I feel that she is able to resume her normal duties without any restrictions. If I were to place any restrictions on this patient they would be on the basis of the degenerative pathology which obviously preexisted the work-related injury of 1982. The restrictions would be related to the degenerative changes in her cervical and lumbar spine.

Thereafter Dr. Williams reviewed the medical records and reported his findings on March 4, 1992:

> [T]his degenerative pathology [in McDougal-Saddler's lumbar and cervical spine] is part and parcel of the normal aging process and has been aggravated by the patient's weight. Since the day of her accident she has been carried with a diagnosis of a cervical and lumbosacral sprain. These types of sprain strains are of a

> temporary and transitory nature and are self-resolving. The work-related incident may have aggravated the preexistent pathology but again on a temporary and transitory nature which resolved leaving her with her preexistent pathology.

As to x-ray findings from 1982, 1984 and 1987, Dr. Williams reported:

> These studies were normal in 1982 and in 1984. Three years later in 1987 we see changes.
> The patient had not been working during this interval so there is no work-related trauma that produced the findings noted on x-rays in 1987. So it was on the basis of the normal wear and tear that she began to show signs of degenerative pathology in 1987.

Dr. Williams reviewed the findings of the 1989 CT scan on the basis of which Dr. Simon modified his first report. Dr. Williams found:

> So what we are seeing here is the progression of degenerative joint and degenerative disc disease over a period of approximately seven years secondary to the normal wear and tear on the body and the aging process.
> The work-related injury did not cause the degenerative pathology first noted in 1987.

The OWCP terminated McDougal-Saddler's compensation on September 20, 1992, concluding that the weight of the medical evidence, represented by Dr. Williams's reports, established that the effects of her April 5, 1985 and May 11, 1982 injuries had ceased. On appeal an OWCP hearing representative found in a November 24, 1993 decision that the opinion of Dr. Williams, the impartial medical specialist, resolved the conflict of medical opinion and established that the effects of the 1982 and 1985 injuries had ceased by September 20, 1992. By letter dated February 27, 1995 McDougal-Saddler requested reconsideration, contending, among other things, that Dr. Williams was not an impartial medical specialist entitled to special weight because Dr. Simon's November 15, 1989 report did not conflict with the conclusions of Dr. Schwartz. The OWCP denied the request for reconsideration, and McDougal-Saddler appealed to the Employees' Compensation Appeals Board ("ECAB").

The ECAB authored a detailed opinion. It weighed the evidence which had been developed during the years following McDougal-Saddler's original injury in May 1982. It contrasted the qualifications of Drs. Williams and Schwartz and analyzed the basis and reasoning of their respective reports. It found "that the weight of the medical evidence establishes that [McDougal-Saddler's] disability related to her May 8, 1982 and April 5, 1985 employment injuries ended by September 20, 1992."

The ECAB, however, agreed with McDougal-Saddler's contention that Dr. Williams was not an impartial medical specialist, not because he was not impartial, but rather because at the time of his appointment there was no conflict of medical opinion:

Appellant is correct in arguing that Dr. Williams was not an impartial medical specialist because there was no conflict of medical opinion at the time of the Office's referral to Dr. Williams. The reports of Dr. Simon, the Board-certified orthopedic surgeon whose second opinion was the basis of the Office's declaration of a conflict of medical opinion, were not sufficient to create such a conflict. In his report dated October 25, 1989, Dr. Simon stated that appellant's "only findings are those of progressive degenerative changes in her neck and back and these certainly would not be causally related to one episode of trauma occurring in 1982 or in 1985" and that "there is no evidence that she has a disc herniation or fracture or dislocation or serious lumbar stenosis problem that would functionally incapacitate her." In his report dated November 15, 1989, Dr. Simon stated that a CT scan done on November 13, 1989 showed "objective evidence that this patient has cervical discogenic abnormalities beyond degenerative changes both in her neck and back." While Dr. Simon did not attribute these "discogenic abnormalities beyond degenerative changes" to appellant's employment injuries, his November 15, 1989 report casts serious doubt on the conclusion in his October 25, 1989 report that appellant had only progressive degenerative changes.

(App. A 41)

The consequence which the ECAB attributed to the denial of impartial medical specialist status to Dr. Williams was ". . . the reports of Dr. Williams are thus not entitled to the special weight afforded to the opinion of an impartial medical specialist resolving a conflict of medical opinion . . ." The ECAB treated Dr. Williams's reports in the same manner as it treated the other medical evidence, giving it no special deference. On March 20, 1996 it affirmed the decision of the OWCP and thereafter denied a petition for reconsideration.

II. The District Court Decision

FECA does not provide for an appeal of an adverse decision of the ECAB. In fact it decrees finality to such a decision:

> (a) The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review, may - (1) end, decrease, or increase the compensation previously awarded; or (2) award compensation previously refused or discontinued.
>
> (b) The action of the Secretary or his designee in allowing or denying a payment under this subchapter is- (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the

> United States or by a court by mandamus or otherwise.

5 U.S.C. § 8128. Nevertheless, McDougal-Saddler filed a complaint and petition for declaratory and injunctive relief in the district court, alleging that DOL has adopted procedures which undercut the statutory directive regarding the appointment of the third physician. She contends that they are subject to review by this court because these procedures violate the clear mandate of the applicable statute and regulation. The complaint cites 5 U.S.C. § 8123(a) which provides in relevant part:

> If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary **shall appoint a third physician who shall make an examination**. (emphasis added).

The complaint cites 20 C.F.R. §10.408 which provides:

> If there should be disagreement between the physician making the examination on the part of the United States and the injured employee's physician, the Office **shall appoint a third physician, qualified in the appropriate specialty, who shall make an examination . . .** (emphasis added).

McDougal-Saddler's complaint alleges that the language of the statute is unambiguous and mandatory as reflected in the regulation quoted above. That is, whenever there is any

disagreement between the employee's and OWCP's physician, the OWCP must appoint a third physician. In its Federal (FECA) Procedural Manual and in practice according to McDougal-Saddler's complaint, OWCP has departed from the statutory command and appoints a third physician only "where the analysis of the evidence demonstrates conflicting opinions or conclusions which are supported almost equally." Generally "[c]areful analysis of the medical evidence should allow for resolution of most issues without resorting to a referee or `impartial' specialist" (Federal (FECA) Procedure Manual, Part Two, Chapter 2- 810-11 a, App. 53). This weighing the evidence procedure, according to the complaint, constitutes a clear violation of § 8123(a).

Defendant moved in the district court pursuant to Fed. R. Civ. P. 12(b)(1) seeking dismissal of the complaint for lack of subject matter jurisdiction. It asserted that§ 8128(b) of FECA bars judicial review of DOL's adjudication of McDougal-Saddler's FECA claim. It asserted that the allegations of the complaint do not constitute a substantial, cognizable constitutional claim over which the district court would have jurisdiction despite § 8128(b). Finally it asserted that there was no exception under § 8128(b) for claims of a violation of a clear statutory mandate and, in any event, the allegations of the complaint do not constitute such a claim.

The district court noted that there is an exception to FECA's prohibition of judicial review if a plaintiff presents a "cognizable" constitutional violation. Rodriguez v. Donovan, 769 F. 2d 1344 (9th Cir. 1995); Czerkies v. Department of Labor, 73 F. 3d 1435, 1438 (7th Cir. 1996). The district court also noted that some courts of appeals have recognized a second exception to the prohibition if the plaintiff establishes

that the actions of the Department of Labor violate a "clear statutory mandate", see, e.g., Hanauer v. Reich, 82 F. 3d 1304, 1309 (4th Cir. 1996).

The district court rejected McDougal-Saddler's constitutional claim. It held that FECA PM2-810 providing for a weighing of the medical evidences before appointing a third physician was simply an interpretive rule clarifying the word "disagreement" in § 8123(a) and therefore did not require public notice or a public comment period to be valid. Its application to McDougal-Saddler did not violate her due process rights or otherwise create a cognizable constitutional claim. McDougal-Saddler does not challenge this ruling in her appeal.

The district court assumed for the purposes of its decision that a violation of a clear statutory mandate creates subject matter jurisdiction for a court to hear a case brought under FECA. It found, however, that because the ECAB interpretation was plausible, there was no such violation, holding:

> The Court concludes that FECA PM2-810 instructs claims examiners in how to determine whether a "disagreement" between physicians exists, and that defendant's interpretation of 5 U.S.C. § 8123(a), using FECA PM 2-810, is plausible. Under that interpretation, it was appropriate for ECAB to decide plaintiff's claim based on the weight of the medical evidence. ECAB did not violate a clear statutory mandate in evaluating plaintiff's

> claim. The statute did not, under the facts presented, require ECAB to remand the case for the appointment of an independent physician to conduct an examination of plaintiff.

The court granted DOL's motion to dismiss.

III. Discussion

This appeal raises important jurisdictional and substantive questions which our court has not addressed.

The language of § 8128(b) is open to differing interpretations. It provides that "[t]he action of the Secretary or her designee in allowing or denying a payment . . ." is (1) final and conclusive for all purposes . . ." It can be argued, as McDougal-Saddler does, that the words "allowing or denying a payment" refer to decisions in individual cases and do not include challenges to "structural components of the system." Czerkies v. U.S. Dept. of Labor, 73 F.3d 1435 (7th Cir. 1996). In dicta four circuits have asserted § 1331 jurisdiction to review claims that OWCP policy violated clear statutory commands. See Staacke v. United States Secretary of Labor, 841 F.2d 278, 281-82 (9th Cir. 1988), citing Oestereich v. Selective Serv. Sys., (1968) and Leedom v. Kyne, (1958)(finding no clear statutory command); Woodruff v. United States Dep't of Labor, 954 F.2d 634, 639-40 (11th Cir. 1992); (same); Brumley v. United States Dep't of Labor, 28 F. 3d 746 (8th Cir. 1994)(same); Hanauer v. Reich, 82 F.3d 1304, 1307-09 (4th Cir. 1996).

McDougal-Saddler makes a plausible argument that the procedures specified in the FECA Procedures Manual violate

the clear mandate of § 8123(a). The statute provides that "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination" (emphasis added). The Procedure Manual requires that OWCP examiner shall engage in a weighing process evaluating the reports of the two physicians and appointing a third physician only "where the analysis of the evidence demonstrate conflicting opinion or conclusions which are almost equally supported" (FECA Bulletin 83-56 (Nov. 9, 1983)). The reasons for these procedures are suggested in the bulletin mandating them:

> In many cases, the findings or opinions of an independent specialist will differ from those of the claimant's attending physician. Previously the tendency in such cases was to automatically refer the claimant and the case record to an impartial specialist. This is a time-consuming process which is not always necessary. Frequently, a decision can be reached by weighing the medical evidence of record without referral to an impartial specialist.

On the present appeal DOL has added extra cost as well as consumption of time as a reason to curtail use of a third physician. If in fact the statute requires the appointment of a third physician these are considerations which DOL should present to Congress rather than departing from a statutory mandate.

Despite the importance of the jurisdictional and substantive issues which McDougal-Saddler raises, they cannot be addressed in this case. A third physician, Dr. Williams, was in fact appointed to review her physical condition; she has received that to which she was entitled under § 8123(a) and thus there is no case or controversy.

FECA establishes a comprehensive and exclusive worker's compensation scheme for federal employees. The Secretary of Labor, or his or her designee, has the authority to administer and to decide all questions arising under FECA. 5 U.S.C. § 8145. Pursuant to this authority the Secretary has delegated the authority provided by§§ 8145 and 8149 to the OWCP, which is responsible for the administration and implementation of FECA. 20 C.F.R. §10.2. Pursuant to statutory mandate the ECAB was established to hear and make final decisions on appeals taken from determinations and awards with respect to claims. The regulations provide that "once OWCP has accepted a claim and paid compensation, it has the burden, before terminating . . . compensation, of establishing by the weight of the evidence that the disability for which compensation was paid has ceased . . ." 20 C.F.R. § 10.110. If a claimant considers herself aggrieved by the OWCP's final determination, FECA provides the means for review. From the date of the decision, the claimant may: 1) within 30 days, request a hearing before an OWCP hearing representative or request that such representative review the written record, 5 U.S.C. § 8124, 20 C.F.R.§ 10.131; 2) within one year, request reconsideration, 5 U.S.C.§ 8128, 20 C.F.R. § 10.138; or 3) within one year,file an appeal with the ECAB. 20 C.F.R. § 10.139.

It is in the context of this claims and appeals process that § 8123(a) requires that "[i]f there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall resolve the conflict." See also 20 C.F.R. §10.408 which mirrors this statutory language but adds the requirement that the third physician be qualified in the appropriate specialty.

As recited above in the statement of the facts both the OWCP and McDougal-Saddler followed these procedures when on December 31, 1987 the OWCP notified McDougal- Saddler that it proposed to terminate her compensation and thereafter when the termination was effected on November 20, 1988 and hearings and appeals were pursued.

McDougal-Saddler submitted a number of reports of Dr. Schwartz in which he described her back and shoulder conditions, attributed them to the April 5, 1985 and May 11, 1982 work incidents, and opined that McDougal- Saddler was totally disabled from work. Dr. Simon submitted a May 4, 1987 report in which he stated that McDougal-Saddler's condition was genetic and not due to any specific incidents of trauma at work. In 1989, after Dr. Simon received a CT scan report which he had requested, he modified his opinion and stated that there was objective evidence that McDougal-Saddler had cervical discogenic abnormalities beyond degenerative changes both in her neck and back. He did not attribute these abnormalities to the 1982 and 1985 work incidents, and he did not agree with Dr. Schwartz that the abnormalities prevented McDougal-Saddler from returning to some form of work.

It was readily apparent that even though Dr. Simon modified his original opinion, there was a significant area of disagreement between him and Dr. Schwartz. Even though for the purposes of its opinion the ECAB chose not to treat this as a "disagreement" between the two physicians, it was clearly a "disagreement" within the plain meaning of § 8123(a).

The OWCB was justified in concluding that there was a disagreement between the physician making the examination for the United States and the physician of the employee. It acted well within the statute and regulations when it appointed Dr. Williams as a third physician. The record demonstrates that Dr. Williams did everything that a third physician is supposed to do, examining McDougal- Saddler, reviewing the medical records and providing a comprehensive report setting forth his findings and the reasons for his findings.

McDougal-Saddler received everything she was entitled to by way of appointment of a third physician. The decision of the ECAB not to recognize Dr. Williams as a third physician does not change this conclusion. That decision only worked to McDougal-Saddler's benefit. Dr. Williams's report was adverse to her position. By failing to treat it as the report of a third physician, the ECAB deprived it of special weight status and treated it in the same manner it treated other medical evidence.

Thus regardless of DOL's interpretation of § 8123(a), McDougal-Saddler received the benefit of the third physician provision. She has not been injured by the manner in which the OWCB may treat the third physician requirement in other

cases, and her complaint in effect seeks simply an advisory opinion. Article III § 2 of the Constitution confers jurisdiction in the federal courts over "cases" and "controversies." To constitute a case or controversy, there must be a plaintiff who has standing to bring the action. Lujan v. Defenders of Wildlife, (1992). To have standing a plaintiff must establish: An "injury in fact" - an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; second, there be a causal connection between the injury and the conduct complained of - the injury has to be "fairly trace[able] to the challenged action of the defendant, and not .. . the result [of] the independent action of some third party not before the court". Third, it must be"likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-61.

McDougal-Saddler sought declaratory and injunctive relief that would have had the effect of restoring her benefits until she had been evaluated by an impartial specialist. The complaint also sought a declaration that "DOL's action in terminating plaintiff's compensation benefits without following 5 U.S.C. 8123(a) and 20 CFR 10.408 is not permitted by the Federal Employees' Compensation Act, 5 U.S.C. 8101 et seq." and "a permanent injunction directing DOL to restore to all other FECA claimants their entitlement to benefits that DOL has terminated or otherwise reduced in violation of the provisions of 5 U.S.C. § 8123(a) and 20 CFR 10.408 until such time as DOL has carried out the requirements[of] 5 U.S.C. 8101 et seq."

As noted above, McDougal-Saddler has received the benefit of § 8123(a)'s third physician requirement. There is no likelihood that she will in the future be filing a claim with the OWCP. Thus she has suffered no injury resulting from DOL's application of § 8123(a) and is not likely to suffer such injury in the future. Her requests for declaratory and injunctive relief challenging the DOL's application of § 8123(a) might benefit other persons, but she herself lacks a cognizable interest in the outcome of this case. In these circumstances McDougal-Saddler does not have standing, and it was appropriate for the district court to dismiss this case. Fair Housing Council v. Montgomery Newspapers, 141 F. 3d 71, 80 (3d Cir. 1998); Blanciak v. Allegheny Ludlum Corp., 77 F. 3d 690, 698-99 (3d Cir. 1996).

IV. Conclusion

For the foregoing reasons, we will affirm the district court's order granting the DOL's motion to dismiss the complaint.

A True Copy: Teste:

Clerk of the United States Court of Appeals for the Third Circuit 16

FOOTNOTES

*Honorable Dickinson R. Debevoise, United States Senior District Judge for the District of New Jersey, sitting by designation.

1. Alexis M. Herman is presently United States Secretary of Labor.

CLEOPATRA MCDOUGAL-SADDLER v. ALEXIS M. HERMAN, SECRETARY, U.S. DEPARTMENT OF LABOR

CIVIL ACTION NO. 97-1908

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

December 24, 1997, Decided

December 24, 1997, Filed; December 26, 1997, Entered

COUNSEL:
For CLEOPATRA MCDOUGAL-SADDLER, PLAINTIFF: JEFFREY P. ZEELANDER, RUCH AND GONTRAM, PHILA, PA USA.

For CYNTHIA METZLER, DEFENDANT: JAMES G. SHEEHAN, ASSISTANT U.S. ATTORNEY-CIVIL DIVISION, PHILA, PA USA. NADINE M. OVERTON, U.S. ATTORNEY'S OFFICE, PHILA, PA USA.

JUDGES:
JAN E. DUBOIS, J.

OPINIONBY:
JAN E. DUBOIS

OPINION:

MEMORANDUM AND ORDER

AND NOW, to wit, this 24th day of December, 1997, upon consideration of the Motion to Dismiss filed by defendant, Alexis M. Herman, Secretary, United States Department of Labor (Document No. 3, filed May 19, 1997); the Memorandum in Opposition to Defendant's Motion to Dismiss filed by plaintiff, Cleopatra McDougal-Saddler (Document No. 4, filed June 2, 1997), and Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss (Document No. 5, filed June 26, 1997) **IT IS ORDERED** that Defendant's Motion to Dismiss is **GRANTED** and the action is **DISMISSED** pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction

.

Defendant's Motion to Dismiss is granted for the following reasons:

I. Facts

1. Plaintiff, Cleopatra McDougal-Saddler, a former employee of the United States Postal Service, suffered injuries at her workplace on May 8, 1982 and April 5, 1985. Beginning in 1982, she was paid workers' compensation benefits under the Federal Employee Compensation Act ("FECA"), *5 U.S.C. § 8101* et seq., based on the opinion of her physician, Dr. David S. Schwartz, that she was totally disabled as a result of her injuries.[1]

2. In May 1989, Dr. William H. Simon, a physician appointed by the Office of Workers' Compensation Programs of the Department of Labor ("OWCP"), examined plaintiff and submitted two reports. In the first report, dated October 25, 1989, Dr. Simon opined that plaintiff's condition was caused by a degenerative condition, not her workplace injuries. After Dr. Simon reviewed a computerized

tomography scan of plaintiff's spine, he concluded in the second report, dated November 15, 1989, that degeneration did not wholly explain plaintiff's condition.

3. A medical advisor at OWCP reviewed Dr. Simon's reports and determined that they conflicted with Dr. Schwartz's medical opinion. Therefore, on October 22, 1991, the medical advisor directed plaintiff to be examined by a third physician, Dr. John T. Williams. The referral was based on a provision of FECA requiring appointment of a third physician if there is a disagreement between the claimant's physician and the physician appointed by the Department of Labor. *5 U.S.C. § 8123*(a) (1996).[2]

4. Dr. Williams examined plaintiff and, on January 21, 1992 and March 4, 1992, submitted reports finding that her condition was not the result of her workplace injuries. OWCP therefore decided on September 2, 1992 to terminate plaintiff's workers' compensation, effective September 20, 1992.

5. Plaintiff requested a hearing on the termination, which was held on September 23, 1993. The OWCP hearing officer found that, based on Dr. Williams' reports, plaintiff's disability due to her workplace injuries had ended by September 2, 1992. Plaintiff twice requested reconsideration, and OWCP denied both requests, first on March 25, 1994 and then on June 6, 1995. Plaintiff then appealed the termination of her benefits to the Employee Compensation Appeals Board ("ECAB"), an appellate body of the Department of Labor.

6. On March 20, 1996, ECAB issued a decision affirming the decision of OWCP. In its decision, ECAB found that Dr. Simon's report was "not sufficient" to conflict with Dr. Schwartz's report, and that plaintiff was therefore improperly referred to Dr. Williams to resolve the alleged disagreement between Drs. Schwartz and Simon. However, ECAB found that Dr. Williams' report constituted the "weight of the medical evidence." Therefore, pursuant to Federal (FECA) Procedure Manual, Ch. 2-810 (April 1993) ("FECA PM 2-810"),[3] ECAB concluded that no disagreement existed between Dr. Schwartz and Dr. Williams, and there was no need for plaintiff to be examined by another doctor. Relying on Dr. Williams' reports, ECAB affirmed the termination of plaintiff's workers' compensation benefits.

II. Analysis

7. Plaintiff's complaint seeks declaratory and injunctive relief. She alleges that in its analysis of her claim, ECAB violated her right to due process and violated a "clear statutory mandate" in FECA to refer her to a third physician in view of the disagreement between her physician, Dr. Schwartz, and one of the physicians appointed by the Department of Labor, Dr. Williams.

8. Defendant, Alexis M. Herman, Secretary, United States Department of Labor, has moved under Federal Rule of Civil Procedure 12(b)(1) to dismiss the action for lack of subject matter jurisdiction pursuant to *5 U.S.C. § 8128*(b).

9. FECA explicitly bars a court from reviewing an action by the Secretary of Labor "allowing or denying a payment" under the statute: "The action of the Secretary is . . . not

subject to review . . . by a court by mandamus or otherwise." *5 U.S.C. § 8128*(b)(2) (1996); see *Hancock v. Mitchell, 231 F.2d 652 (3d Cir. 1956)* (holding that the prohibition on judicial review of FECA claims is constitutional).

10. Courts have recognized an exception to the prohibition on judicial review in FECA if the plaintiff presents evidence of a "cognizable" constitutional violation. *Rodrigues v. Donovan, 769 F.2d 1344 (9th Cir. 1995); Czerkies v. Department of Labor, 73 F.3d 1435, 1438 (7th Cir. 1996)* (citing cases). However, the constitutional claim must be more than an allegation.

11. Some courts of appeals have recognized a second exception to the prohibition if the plaintiff establishes that the actions of the Department of Labor violate a "clear statutory mandate." See, e.g., *Hanauer v. Reich, 82 F.3d 1304, 1309 (4th Cir. 1996); Brumley v. Department of Labor, 28 F.3d 746 (8th Cir. 1994); Woodruff v. Department of Labor, 954 F.2d 634 (11th Cir. 1992).* The Third Circuit has not yet ruled on this issue. See, also, Chaklos v. Reich, No. 95-1763, slip op. (W.D. Pa. 1996) aff'd by *101 F.3d 689 (3d Cir. 1996)* (table).

12. Plaintiff contends that both exceptions apply in this case. She alleges that ECAB both acted unconstitutionally and violated a clear statutory mandate by affirming the termination of her benefits.

A. Plaintiff's Constitutional Claim

13. Plaintiff argues that ECAB violated her right to due process under the Fifth Amendment by using the procedures

in FECA PM 2-810 to evaluate her workers' compensation claim.

14. FECA provides that "if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." *5 U.S.C. § 8123*(a) (1996).

15. FECA PM 2-810 includes criteria for weighing medical evidence to determine if a disagreement exists. The factors to be used include whether the opinion is well reasoned, comprehensive, consistent with physical findings, non-equivocal, and based on "a complete factual and medical background" and an actual examination of the claimant. The qualifications and areas of expertise of the doctor are also considered. FECA PM 2-810 at 3(a-b). FECA PM 2-810 then describes the circumstances which make it necessary for a third physician to examine a claimant: "Where the analysis of the evidence demonstrates conflicting opinions or conclusions which are supported almost equally, the services of a referee specialist must be utilized." Id. at 11(a).

16. Plaintiff claims that rather than weighing the medical evidence in the reports of Drs. Schwartz and Williams using FECA PM 2-810, see, In re Cleopatra McDougal-Saddler, slip op., No. 95-2634 (ECAB March 20, 1996), ECAB should have remanded her case for an examination by a third physician, (in reality a fourth physician) as required by § 8123(a).[4]

17. According to plaintiff, FECA PM 2-810 alters the meaning of § 8123(a) of FECA, and is therefore a

"legislative rule." See, *Dia Navigation Co. v. Pomeroy, 34 F.3d 1255, 1264 (3d Cir. 1994)* (defining a legislative rule as one that "creates rights, assigns duties, or imposes obligations, the basic tenor of which is not already outlined in the law itself . . .") (internal citations omitted).

18. To be valid, a legislative rule requires notice in the Federal Register that it has been proposed and a period of public comment before it is implemented. See, Administrative Procedure Act, *5 U.S.C. § 553* (1996). As no notice or comment period was provided before FECA PM 2-810 was implemented, plaintiff contends that it is a void rule and was unconstitutionally used to evaluate her claim for workers' compensation benefits.

19. Defendant argues that FECA PM 2-810 is an "interpretive" rule used to clarify the word "disagreement" in *5 U.S.C. § 8123*(a), n5 and therefore it did not need public notice or a comment period to be effective. See, *Dia Navigation, 34 F.3d at 1255* ("interpretive rules typically involve construction or clarification of a statute or regulation.") and *5 U.S.C. § 553*(b)(A) (1996) (notice and comment requirement does not apply to interpretive rules).

20. The Court concludes that FECA PM 2-810 is an interpretive rule which clarifies the word "disagreement" in *5 U.S.C. § 8123*(a). See, FECA PM 2-810 at 2(d) ("A thorough understanding of how to weigh medical evidence will assist the [claims examiner] in determining when and how further medical development should be undertaken and in assigning weight to the medical evidence received") and see FECA PM 2-810 at 11(a) ("Where the analysis of the evidence demonstrates conflicting opinions or conclusions which are

supported almost equally, the services of a referee specialist must be utilized.").

21. As an interpretive rule, FECA PM 2-810 did not require public notice or a public comment period to be valid. Thus, ECAB's application of FECA PM 2-810 to plaintiff's claim for benefits did not violate plaintiff's due process rights and did not otherwise create a cognizable **[*11]** constitutional claim.

22. Plaintiff's allegation of a violation of her due process rights does not create subject matter jurisdiction in this case.

B. Plaintiff's Claim of a Violation of a Clear Statutory Mandate

23. Plaintiff argues that the actions of the Department of Labor violated a "clear statutory mandate" in FECA which creates subject matter jurisdiction in this Court.

24. Assuming, arguendo, that a violation of "clear statutory mandate" creates subject matter jurisdiction for a court to hear a case brought under FECA, plaintiff has not made a showing of such a violation.

25. To determine whether a clear statutory mandate has been violated, the Court must conduct a "cursory review of the merits." *Hanauer, 82 F.3d at 1309.* If the Secretary of Labor's interpretation of the statute is "plausible," then no violation of a clear statutory mandate has occurred. *Staacke v. United States Secretary of Labor, 841 F.2d 278 (9th Cir. 1988).*

26. In the instant case, plaintiff argues that defendant violated the clear statutory mandate in FECA to refer plaintiff to a

third physician if there was a disagreement between plaintiff's physician and the physician appointed by the Department of Labor. See *5 U.S.C. § 8123*(a) (1996).[6]

27. Defendant contends that the use of FECA PM 2-810 to interpret the word "disagreement" in § 8123(a) n7 is plausible, and therefore no violation of a clear statutory mandate has occurred.[8]

28. The Court concludes that FECA PM 2-810 instructs claims examiners in how to determine whether a "disagreement" between physicians exists, and that defendant's interpretation of *5 U.S.C. § 8123*(a), using FECA PM 2-810, is plausible. Under that interpretation, it was appropriate for ECAB to decide plaintiff's claim based on the weight of the medical evidence.

29. ECAB did not violate a clear statutory mandate in evaluating plaintiff's claim. The statute did not, under the facts presented, require ECAB to remand the case for the appointment of an independent physician to conduct an examination of plaintiff.

BY THE COURT:
JAN E. DUBOIS, J.

Footnotes

[1] Plaintiff was paid workers' compensation benefits until she returned to work briefly in March 1985. On April 5, 1985 she sustained a second workplace injury which rendered her unable to work, and she was again paid workers' compensation benefits.

[2] "If there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." *5 U.S.C. § 8123*(a) (1996).

[3] "Careful analysis of the medical evidence should allow for resolution of most issues without resorting to a referee or 'impartial' specialist." It is only "where the analysis of the evidence demonstrates conflicting opinions or conclusions which are supported almost equally [that] the services of a referee specialist must be utilized." FECA PM 2-810 at 11(a).

[4] See, supra, note 2.

[5] See, supra, note 2.

[6] See, supra, note 2.

[7] See, supra, paragraph 15 for a description of the criteria included in FECA PM 2-810.

[8] This appears to be a change from earlier ECAB policy. In similar cases, when OWCP mistakenly determined that two doctors disagreed, ECAB would remand the case for examination by a new physician to resolve the conflict between the claimant's doctor and the doctor who was erroneously appointed as a "third physician" to resolve a disagreement later found not to exist. See, In re Myrtle Pittman, 40 ECAB 880, 881 (1989) (citing cases). However, as discussed supra, this change in policy does not violate a "clear statutory mandate" and would not give this Court subject matter jurisdiction even if the Court accepted the violation of a clear statutory mandate theory of jurisdiction.

CLEOPATRA McDOUGAL-SADDLER, Appellant v. ALEXIS M. HERMAN, Secretary, U.S. Department of Labor, Appellee

No. 98-1068

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Dated 10/6/99

SUR PETITION FOR REHEARING

Presnet: BECKER, CHIEF JUDGE

SLOVITER, MANSMANN, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE and RENDELL, Circuit Judges and DEBEVOISE, District Judge*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judes who paritcipated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Becker would have granted rehearing.

BY THE COURT,

Circuit Judge
Hon. Theordore A. McKee

Supreme Court, U.S.
FILED
MAR 10 2000
CLERK

No. 99-1144

In the Supreme Court of the United States

CLEOPATRA MCDOUGAL-SADDLER, PETITIONER

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HENRY L. SOLANO
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTIONS PRESENTED

Section 8128(b) of Title 5, United States Code, provides that a decision of the Secretary of Labor in allowing or denying a payment under the Federal Employees' Compensation Act (FECA) "is (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." The questions presented are:

1. Whether Section 8128(b) precludes a district court from reviewing a decision of the Secretary denying payment under FECA where the claimant alleges that the Secretary violated a clear statutory mandate.

2. Whether the Secretary violated a clear statutory mandate by declining to appoint an additional physician to examine petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	18
Appendix A	1a
Appendix B	18a
Appendix C	20a

TABLE OF AUTHORITIES

Cases:

Avedis v. *Herman*, 25 F. Supp. 2d 256 (S.D.N.Y. 1998), appeal withdrawn, No. 99-6053 (2d Cir. May 3, 1999)	13
Becker, In re, 31 E.C.A.B. 441 (1980)	13
Blanc v. *United States*, 244 F.3d 708 (2d Cir.), cert. denied, 355 U.S. 874 (1957)	9
Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984)	15
Board of Governors of Fed. Reserve Sys. v. *MCorp Fin., Inc.*, 502 U.S. 32 (1991)	16
Brumley v. *Department of Labor*, 28 F.3d 746 (8th Cir. 1994), cert. denied, 513 U.S. 1082 (1995)	10
Czerkies v. *Department of Labor*, 73 F.3d 1435 (7th Cir. 199[illegible]	16
Dismuke v. *United States*, 297 U.S. 167 (1936)	16
Hanauer v. *Reich*, 82 F.3d 1304 (4th Cir. 1996)	9, 10, 11, 14
Johnson v. *Robison*, 415 U.S. 361 (1974)	16
Lindahl v. *Office of Personnel Management*, 470 U.S. 768 (1985)	9
Mason, In re, 4 E.C.A.B. 96 (1950)	13
Owens v. *Brock*, 860 F.2d 1363 (6th Cir. 1988)	10
Phares, In re, 15 E.C.A.B. 146 (1963)	13

Cases—Continued: Page

Paluca v. *Secretary of Labor*, 813 F.2d 524 (1st Cir.), cert. denied, 484 U.S. 943 (1987) 10, 17
Soderman v. *Civil Serv. Comm'n*, 313 F.2d 694 (9th Cir. 1962), cert. denied, 372 U.S. 968 (1963) 16
Soeken v. *Herman*, 35 F. Supp. 2d 99 (D.D.C. 1999), aff'd mem., No. 99-511, 1999 WL 1215942 (D.C. Cir. Nov. 23, 1999) 11
Southwest Marine, Inc. v. *Gizoni*, 502 U.S. 81 (1991) 9
Staacke v. *Secretary of Labor*, 841 F.2d 278 (9th Cir. 1988) 9, 10, 11
Thunder Basin Coal Co. v. *Reich*, 510 U.S. 200 (1994) 15
Traynor v. *Turnage*, 485 U.S. 535 (1988) 16, 17
United States v. *Fausto*, 484 U.S. 439 (1988) 15, 16
White v. *United States*, 143 F.3d 232 (5th Cir. 1998) 9
Wise, In re, 4 E.C.A.B. 87 (1950) 13
Woodruff v. *Department of Labor*, 954 F.2d 634 (11th Cir. 1992) 9-10

Statutes and regulations:

Rehabilitation Act of 1973, 29 U.S.C. 794 17
Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*:
5 U.S.C. 8102(a) 2
5 U.S.C. 8121 2
5 U.S.C. 8123(a) 3, 4, 5, 6, 7, 8, 12, 14, 17
5 U.S.C. 8124 ..... 3, 8
5 U.S.C. 8124(a) 12
5 U.S.C. 8128 3
5 U.S.C. 8128(a) 9
5 U.S.C. 8128(b) ..... *passim*
5 U.S.C. 8128(b)(2) 6
5 U.S.C. 8145 ..... 2, 8, 12
5 U.S.C. 8149 ..... 2, 9

Statute and regulations—Continued: Page

38 U.S.C. 211(a) (1970) 16
20 C.F.R. Pt. 10 (1998) 2
Section 10.2 2
Section 10.130 2
Section 10.131 ..... 3, 9
Section 10.138 ..... 3, 9
Section 10.139 ..... 3, 9
Section 10.301 12
Section 10.321 (1999) 13
Section 10.502 (1999) 13

Miscellaneous:

63 Fed. Reg. (1998):
p. 65,284 ..... 2, 13
p. 65,294 13

In the Supreme Court of the United States

No. 99-1144

CLEOPATRA MCDOUGAL-SADDLER, PETITIONER

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals on panel rehearing (Pet. App. 1a-17a) is reported at 184 F.3d 207. The court of appeals' initial opinion (Pet. App. 18a-37a) is reported at 161 F.3d 198, and the order vacating that opinion (App., *infra*, 20a) is reported at 169 F.3d 178. The district court's memorandum and order (Pet. App. 38a-47a) is not yet reported, but can be found at 1997 WL 835414. The decision and order of the Department of Labor Employees' Compensation Appeals Board (App., *infra*, 1a-17a) is reported at 47 E.C.A.B. 480, and the Board's order denying reconsideration (App., *infra*, 18a-19a) is unreported.

JURISDICTION

The court of appeals issued its decision on panel rehearing on July 2, 1999, and denied rehearing on October 6, 1999 (Pet. App. 48a). The petition for a writ of certiorari was filed on January 4, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Employees' Compensation Act (FECA) provides workers' compensation benefits to employees of the United States who become disabled or die from work-related injuries. 5 U.S.C. 8102(a). The Secretary of Labor is authorized to "administer, and decide all questions arising under" FECA, and to make rules and regulations necessary for the administration and enforcement of the statute. 5 U.S.C. 8145, 8149. The Secretary has delegated her authority to administer and enforce the statute to the Director, Office of Workers' Compensation Programs (OWCP). 20 C.F.R. 10.2.[1] As required by statute, 5 U.S.C. 8149, the Secretary has also created an Employees' Compensation Appeals Board (ECAB) to hear and make final decisions on appeals from OWCP determinations, 20 C.F.R. 10.301.

When a claim is filed, OWCP investigates and obtains necessary medical evidence. 5 U.S.C. 8121; 20 C.F.R. 10.130. An employee must submit to examination by a medical officer of the United States, or by a physician designated and approved by the Secretary, and may

---

[1] Unless otherwise stated, this brief, like the petition, cites the regulations in effect at the time the decisions in this case were issued. See 20 C.F.R. Pt. 10 (1998). The current regulations became effective January 4, 1999, but do not apply to any issue decided for the first time before their effective date. See 63 Fed. Reg. 65,284 (1998).

have a physician designated by the employee present to participate in the examination. 5 U.S.C. 8123(a). The statute further provides that, "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. 8123(a).

When OWCP makes a decision adverse to a claimant, the claimant can either request a hearing before an OWCP hearing representative, request reconsideration before OWCP, or appeal to the ECAB. 5 U.S.C. 8124, 8128; 20 C.F.R. 10.131, 10.138, 10.139. Section 8128(b) of Title 5, United States Code, makes those mechanisms for administrative review exclusive, and specifically precludes judicial review of the Secretary's decisions under FECA:

> The action of the Secretary or [her] designee in allowing or denying a payment under [FECA] is—(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

5 U.S.C. 8128(b).

2. In May 1982 and in April 1985, petitioner injured her back, neck and shoulder while working for the United States Postal Service. Pet. App. 2a-3a, 39a. She received FECA benefits for temporary total disability on both occasions. *Ibid.* In 1987, her treating physician, Dr. Schwartz, reported that she was totally disabled "for the near indefinite future." *Id.* at 3a; App., *infra*, 1a, 3a-4a. OWCP referred petitioner to an orthopedic surgeon, Dr. Simon, who concluded that petitioner had a slowly developing degenerative condition that was not due to any specific incidents of trauma occurring at

work. App., *infra*, 4a; see Pet. App. 3a. OWCP terminated petitioner's benefits in November 1988, but reinstated them in February 1989 on the ground that petitioner had not received a copy of Dr. Simon's report. Pet. App. 4a; App., *infra*, 5a. Because Dr. Simon's evaluation was by then almost two years old, OWCP also asked him to do a reevaluation. App., *infra*, 5a; Pet. App. 4a.

In October 1989, Dr. Simon again concluded that petitioner had a degenerative condition that was not caused by her workplace injuries. App., *infra*, 6a-7a; Pet. App. 39a. After obtaining further testing and a report from a radiologist, however, Dr. Simon concluded that petitioner had abnormalities beyond degenerative changes. App., *infra*, 7a; Pet. App. 4a, 39a-40a. Dr. Simon did not state whether, in his view, those abnormalities were caused by a workplace injury. He did state, however, that the abnormalities were only partially disabling and that petitioner could return to some form of work. App., *infra*, 8a; Pet. App. 22a.

Based on all the submitted reports, OWCP found a conflict in medical opinion and in 1991 referred petitioner to another orthopedic surgeon, Dr. Williams, pursuant to 5 U.S.C. 8123(a). Pet. App. 4a-5a, 40a; App., *infra*, 8a. Section 8123(a) provides that, "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." In 1992, after examining petitioner, her medical records—including x-ray reports and findings from 1982, 1984, and 1987, as well as a 1989 CT scan—and the reports of the other physicians who examined her, Dr. Williams reported that petitioner had no work-related disability. App., *infra*, 9a-11a; see Pet. App. 5a, 40a. Based on Dr.

Williams' report, OWCP decided to terminate petitioner's compensation. After affording petitioner a hearing and opportunities to present additional evidence, OWCP adhered to that decision. See Pet. App. 5a-6a; App., *infra*, 11a- 12a.

Petitioner appealed to the ECAB. She argued that Dr. Williams was not a third physician under 5 U.S.C. 8123(a) because there was no conflict between her physician and the orthopedic surgeon, Dr. Simon, to whom OWCP had previously referred her. App., *infra*, 13a. The ECAB agreed with petitioner on that point, App., *infra*, 15a-16a, but nevertheless affirmed OWCP's termination of benefits. The ECAB reasoned that, although Dr. Williams' reports were not entitled to the "special weight" that the ECAB gives to the opinion of an impartial medical specialist appointed in response to a conflict of medical opinion under 5 U.S.C. 8123(a), the reports could "still be considered for their own intrinsic value and can still constitute the weight of the medical evidence." App., *infra*, 16a-17a. Weighing the medical evidence, the ECAB concluded that Dr. Williams' reports were the most reliable and probative evidence and were sufficient to establish that any disability related to petitioner's 1982 and 1985 injuries had ended by September 1992. *Ibid.* The report of Dr. Schwartz, in contrast, was conclusory in nature and failed to justify the conclusion that petitioner's disability was causually related to her employment. App., *infra*, 15a. The ECAB subsequently denied petitioner's request for reconsideration. App., *infra*, 18a-19a.

3. In March 1997, petitioner filed a district court action alleging, among other things, that the ECAB violated a clear statutory mandate in 5 U.S.C. 8123(a). In particular, she argued that Section 8123(a) required the Secretary to appoint a third physician to resolve the

disagreement between her physician and Dr. Williams, and that the Secretary had failed to do so. Pet. App. 41a. In particular, she argued that *any* inconsistency in medical opinions was sufficient to trigger Section 8123(a), and she challenged the Secretary's policy of weighing the evidence to determine whether appointment of a third physician is necessary.[2]

The Secretary filed a motion to dismiss, which the district court granted. Pet. App. 38a-47a. The district court noted that 5 U.S.C. 8128(b)(2) declares that the Secretary's decisions respecting FECA claims are "not subject to review by another official of the United States or by a court by mandamus or otherwise." Nevertheless, the court assumed for the sake of argument that it would have jurisdiction to hear the suit (notwithstanding 5 U.S.C. 8128(b)) if petitioner could show that the Secretary had violated a clear statutory command. Pet. App. 45a-46a. Petitioner, however, had failed to show such a violation. *Ibid.* Section 8123(a), the district court reasoned, does require the appointment of a third physician to resolve a "disagreement" between the employee's physician and the physician for the government. But it does not set forth the quantum of proof or credibility an opinion must have before it is sufficient to create a genuine "disagreement" within the meaning of the statute. As a result, the district court concluded, Section 8123(a) can plausibly be read to permit some weighing of medical evidence, under specified criteria, to ensure that a material disagreement exists, which is what the Secretary did here. *Id.* at 43a.

---

[2] Petitioner also alleged that the Secretary's termination of her benefits violated due process. Pet. App. 42a. The district court rejected that argument, *id.* at 42a-45a, and petitioner neither raised it on appeal, *id.* at 9a, 12a, nor raises it in this Court.

Because the ECAB did not violate a clear statutory mandate, the district court held judicial review was not available—even if one were to recognize a "clear statutory mandate" exception to the preclusion provided by 5 U.S.C. 8128(b). Pet. App. 46a.

4. The court of appeals initially affirmed on the ground that petitioner lacked standing to claim a violation of 5 U.S.C. 8123(a). Pet. App. 18a-37a. The court reasoned that, although petitioner raised a "plausible" challenge to the Secretary's policy of weighing evidence before appointing a third physician in response to conflicting medical opinions, in this case a third physician (Dr. Williams) had been appointed, and petitioner had received the examination provided by Section 8123(a). Pet. App. 31a-33a. Accordingly, the court held that petitioner had suffered no legal harm as a consequence of the policy she sought to challenge. *Id.* at 35a-37a.

In response to petitioner's request for rehearing, the panel vacated its decision and affirmed the district court on different grounds. In particular, it held that 5 U.S.C. 8128(b) deprived the district court of subject matter jurisdiction. Pet. App. 1a-17a.[3] Initially, the court stated that it was "difficult to square" the Secretary's policy, under which the Secretary would weigh medical reports when determining whether to appoint a third physician, with the statutory mandate to appoint a third physician "if there is disagreement" between the government's and the employee's physicians. *Id.* at 8a (quoting 5 U.S.C. 8123(a)). The court

---

[3] The Secretary supported rehearing on the ground that the panel's initial decision had improperly reviewed the Secretary's action in terminating petitioner's benefits instead of dismissing the appeal for lack of subject matter jurisdiction.

reasoned, however, that Congress was "absolutely free" to limit the extent to which it consents to suit against the United States or its instrumentalities and that Section 8128(b) could "hardly be plainer" in barring judicial review altogether. Pet. App. 11a. The court concluded that nothing in FECA's legislative history permitted an exception that would allow judicial review of an asserted violation of a clear statutory mandate. *Id.* at 12a. The language of 5 U.S.C. 8128(b), the court of appeals explained, provides "clear and convincing evidence that Congress intended to deny district courts jurisdiction to review decisions of the [Secretary]," and "is broad enough to include both policy or rule making decisions of the Secretary as well as individual benefit determinations." Pet. App. 16a.

ARGUMENT

Petitioner argues (Pet. 4-7) that the Secretary violated the clear statutory mandate of 5 U.S.C. 8123(a) by failing to appoint another physician to resolve an alleged disagreement between her physician (Dr. Schwartz) and Dr. Williams. Review is warranted, petitioner asserts, to resolve a conflict in the courts of appeals on whether FECA allows judicial review of Secretarial action that violates a clear statutory mandate. This case, however, would have been resolved the same way regardless of the circuit in which it arose, and it is far from clear that the alleged conflict petitioner identifies is meaningful and genuine. As a result, further review is not warranted.

1. Congress gave the Secretary the authority to "administer, and decide all questions arising under" FECA. 5 U.S.C. 8145. Consistent with that grant of authority, Congress provided for hearings, review, and appeal within the Department of Labor. 5 U.S.C. 8124,

8128(a), 8149. See also 20 C.F.R. 10.131, 10.138, 10.139. At the same time, Congress declined to provide for judicial review of the Secretary's actions on such claims. In particular, 5 U.S.C. 8128(b) declares:

> The action of the Secretary * * * in allowing or denying a payment * * * is (1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review * * * by a court by mandamus or otherwise.

This Court has twice recognized that FECA's prohibition against judicial review uses the kind of "unambiguous and comprehensive" language that Congress "typically employs" when it "intends to bar judicial review altogether." *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768, 779-780 & n.13 (1985); see *Southwest Marine, Inc.* v. *Gizoni*, 502 U.S. 81, 90 (1991). See also *White* v. *United States*, 143 F.3d 232, 237 (5th Cir. 1998) (explaining that the preclusion of review provision effectuates Congress's intent to establish a uniform system of compensation, administered by the Secretary, without generating the costs and delays associated with litigation); *Blanc* v. *United States*, 244 F.2d 708, 710 (2d Cir.) (similar), cert. denied, 355 U.S. 874 (1957). In this case, the court of appeals applied the plain terms of Section 8128(b) to conclude that petitioner's challenge to the Secretary's actions was not judicially cognizable.

Petitioner contends (Pet. 6-9) that the court of appeals' decision conflicts with *Hanauer* v. *Reich*, 82 F.3d 1304 (4th Cir. 1996), and *Staacke* v. *Secretary of Labor*, 841 F.2d 278 (9th Cir. 1988).[4] In this case, the

---

[4] Petitioner errs in contending (Pet. 6) that the decision below also conflicts with *Woodruff* v. *Department of Labor*, 954 F.2d 634

court of appeals concluded that Section 8128(b) deprives district courts of jurisdiction to review the Secretary's actions, even if the Secretary violates a clear statutory mandate. Pet. App. 12a. See also *Paluca* v. *Secretary of Labor*, 813 F.2d 524, 527, 528 (1st Cir.), cert. denied, 484 U.S. 943 (1987). In contrast, in *Hanauer* and in *Staacke*, the courts of appeals stated that, if the Secretary violated a clear statutory mandate, Section 8128(b) would not deprive district courts of jurisdiction. *Hanauer*, 82 F.3d at 1309 (district courts have jurisdiction unless "a cursory review of the merits reveals that the Secretary did not violate a clear statutory mandate"); *Staacke*, 841 F.2d at 280-282 (finding no violation of a clear statutory mandate).

Despite the inconsistent language in those cases, it is not clear that a genuine circuit conflict exists. As petitioner recognizes (Pet. 6), no court of appeals has ever actually held the Secretary's action to be reviewable notwithstanding Section 8128(b). To the contrary, in both *Hanauer* and *Staacke*, the courts concluded that,

---

(11th Cir. 1992), and *Brumley* v. *Department of Labor*, 28 F.3d 746 (8th Cir. 1994), cert. denied, 513 U.S. 1082 (1995). Neither *Woodruff* nor *Brumley* takes a position on whether district courts can review Secretarial action alleged to conflict with a "clear statutory mandate" notwithstanding Section 8128(b). *Woodruff* specifically found it unnecessary to decide that question. 954 F.2d at 640-641 n.14. And, while *Brumley* (inaccurately) characterizes *Woodruff* as having held such review to be permissible, *Brumley* itself did not state whether or not it was inclined to follow that characterization of *Woodruff*. 28 F.3d at 747. See also *Owens* v. *Brock*, 860 F.2d 1363, 1367 (6th Cir. 1988) (stating that courts have unanimously held that FECA prohibits judicial review of FECA benefit determinations "[e]xcept for cases alleging that the Secretary violated a claimant's constitutional rights or exceeded the scope of his congressional mandate").

because the Secretary had not violated a clear statutory mandate, Section 8128(b) barred judicial review. *Hanauer*, 82 F.3d at 1309-1311 (Secretary may decide not to pay benefits in a lump sum for a class of cases instead of adjudicating individual requests for lump sum payments); *Staacke*, 841 F.2d at 281 (Secretary may interpret statutory requirement to pay a scheduled award "in addition to" temporary partial disability benefits to mean pay the award subsequent to such benefits). For that reason, the Third Circuit in this case characterized the language on which petitioner relies from *Hanauer* and *Staacke* as dictum. Pet. App. 17a n.2.

Moreover, *Staacke* and *Hanauer* are not inconsistent with complete foreclosure of judicial review, even where the plaintiff alleges violation of a clear statutory mandate. In *Staacke*, the Ninth Circuit held that, because the Secretary has "virtually limitless" discretion to make policy choices under FECA, "there can be no review based on a violation of a clear statutory mandate." *Staacke*, 841 F.2d at 282. At least one court has therefore read *Staacke* as declaring that, while a "clear statutory mandate" exception to Section 8128(b)'s preclusive scope may exist in theory, in practice the Secretary's expansive discretion under the statute precludes that "clear statutory mandate" standard from ever being met. *Soeken* v. *Herman*, 35 F. Supp. 2d 99, 103 (D.D.C. 1999) (*Staacke* "rejected the 'statutory mandate' exception"), aff'd mem., No. 99-511, 1999 WL 1215942 (D.C. Cir. Nov. 23, 1999). The Fourth Circuit, which has recognized the possibility of review where a clear statutory mandate is violated, *Hanauer*, 82 F.3d at 1309, may yet reach the same conclusion. Thus, while there is language in *Staacke* and *Hanauer* that appears inconsistent with language in the opinion

below, the inconsistency may be of just that—language—and not of substance or results.

In any event, if the decision below is in tension with *Hanauer* and *Staacke*, this case is not an appropriate vehicle for resolving that tension. As the district court recognized, the "clear statutory mandate" exception to Section 8128(b)'s preclusive scope would not result in jurisdiction over this case even if that exception were recognized. See Pet. App. 45a-46a (finding no jurisdiction even assuming, *arguendo*, that a clear statutory mandate exception exists). Simply put, the Secretary's policy of "weighing" the evidence to ensure that any dispute genuinely constitutes a "disagreement" warranting the appointment of another physician does not violate a clear statutory mandate.

While Section 8123(a) explicitly requires the Secretary to appoint a third physician to make an examination "[i]f there is disagreement between the physician making the examination for the United States and the physician of the employee," 5 U.S.C. 8123(a),[5] it does not define what constitutes a "disagreement" within the meaning of that provision. Pursuant to her authority to "administer, and decide all questions arising under, this subchapter," 5 U.S.C. 8145, the Secretary has concluded that a "disagreement" between physicians warranting a further examination does not exist, for example, where the two allegedly conflicting opinions are not both so well-supported that a factfinder could reasonably credit either one. Thus, where one of the two reports or

---

[5] Contrary to petitioner's assertions (Pet 3, 5), that Section does not give the "third physician" the authority to act as a factfinder. Instead, 5 U.S.C. 8124(a) expressly provides that "[t]he Secretary of Labor shall determine and make a finding of facts * * * ."

opinions is insufficient to support a judgment—because it is shown to be based on faulty assumptions, unsupported by objective evidence, unreasoned, or otherwise lacks the persuasiveness necessary to support an award or denial of benefits—there is no material "disagreement" within the meaning of the statute and no further examination is required. Under petitioner's construction of "disagreement," by contrast, the Secretary would have to send a claimant for further medical evaluation based on conclusory medical opinions that are insufficient to support an award of benefits—increasing costs and delays without producing benefits. *Avedis* v. *Herman*, 25 F. Supp. 2d 256, 264-265 (S.D.N.Y. 1998) (broader view of "disagreement" would find a "'conflict' between a Board-certified specialist providing a well-rationalized opinion and a non-specialist who may have merely checked a box on a form indicating the presence of causal relationship or disability without providing any explanation"), appeal withdrawn, No. 99-6053 (2d Cir. May 3, 1999); Pet. App. 32a (Secretary's reasoning). See Pet. App. 43a (citing FECA PM 2-810).[6] Because the Secretary's construc-

[6] Petitioner incorrectly asserts (Pet. 5) that the Secretary's weighing process was instituted in 1983. Before 1983, the ECAB often resolved conflicting evidence based on the weight of the evidence, see, *e.g.*, *In re Wallace E. Mason*, 4 E.C.A.B. 96, 97-98 (1950); *In re William D. Wise*, 4 E.C.A.B. 87, 89 (1950), and recognized that, in cases involving a conflict in medical opinion, whether an independent expert's opinion is necessary "depends on the nature of the particular conflict." *In re Ruth L. Becker*, 31 E.C.A.B. 441, 445 (1980). See also *In re Madge V. Phares*, 15 E.C.A.B. 146, 149 (1963). The Secretary's views on referrals and weighing have recently been codified. See 20 C.F.R. 10.321, 10.502 (1999); 63 Fed. Reg. 65,284, 65,294 (1998). Similarly, because the Secretary permissibly interprets the term "disagreement" to mean a disagreement from the perspective of the claims examiner (i.e.,

tion is manifestly reasonable, it would not be reviewable under a "clear statutory mandate" exception to 5 U.S.C. 8128(b), even if one were recognized. See *Hanauer*, 82 F.3d at 1309 ("If a cursory review of the merits reveals that the Secretary did not violate a clear statutory mandate," i.e., if the Secretary's construction is "plausible," then "the case must be dismissed for lack of subject matter jurisdiction.").[7]

---

differing medical views of sufficient weight to be material to the claims adjudication so that the claims examiner cannot resolve the claim on the existing record), it is not relevant that FECA, before its 1966 codification, required referrals to a third physician for "any disagreement." See Pet. 2-3 n.1. The term "any" does not expand the term "disagreement" to include matters that are either irrelevant or resolvable by the claims examiner.

[7] Indeed, even under a much more modest standard of what constitutes a "disagreement" within the meaning of Section 8123(a), the evidence and opinions petitioner relies on would not be sufficient to establish a conflict. Dr. Williams explained that: (1) the type of injury petitioner incurred in 1982 and that flared up in 1985 was a soft tissue (strain) injury that is generally self-resolving, App., *infra*, 9a; (2) the pain petitioner was suffering ten years later in 1992 was caused by abnormalities/degeneration of the cervical and lumbar spine (bones), not soft-tissue problems, *ibid.*; and (3) the abnormalities and degeneration were not caused by a work-related incident, but were rather the product of genetic predisposition, age, and obesity, *id.* at 9a-10a. Moreover, Dr. Williams pointed out, the abnormalities did not appear in x-rays taken in 1982 and 1985 (shortly after petitioner's injury) but first appeared instead in 1987, after petitioner had been out of work for years. Because petitioner "had not been working during this interval," he explained, "there is no work-related trauma that produced the findings noted on x-rays in 1987." *Id.* at 11a, 14a. Dr. Williams' opinion was confirmed by the independent review conducted by another Board-certified orthopedic surgeon, Dr. Glazer, *id.* at 14a, and was consistent with the opinion of Dr. Simon, the other orthopedic surgeon who examined petitioner. See *id.* at 4a, 15a-16a (citing "genetic predisposition to

2. Alternatively, petitioner argues (Pet. 7-10) that the court of appeals' decision is inconsistent with *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1993), and *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984). According to petitioner, those cases permit judicial review to be precluded only where "five elements combine to demonstrate Congress' desire to cut off review: the reviewability statutory language, the structure of the statutory scheme, the statute's objectives, the legislative history, and the nature of the administrative action involved." Pet. 7. In fact, this Court has recognized that the general presumption favoring judicial review may be overcome by specific statutory language *or* by other reliable indicia of congressional intent. *Block*, 467 U.S. at 349. Thus, in *Block*, 467 U.S. at 345-349, and *Thunder Basin*, 510 U.S. at 207-216, the Court relied on implication rather than express statutory language to find that certain agency actions were not judicially reviewable. See also *United States* v. *Fausto*, 484 U.S. 439 (1988) (inferring

---

degenerative disc disease" that is not "due to any specific incidents of trauma occurring at work."). To establish a conflict in medical opinions, petitioner relies on a statement by Dr. Schwartz—a physician not qualified in the relevant area of specialty—that the disability should be considered work-related because petitioner began suffering pain at the time of her injury in 1982, and the matter had not been resolved by 1992. *Id.* at 15a. But the Board consistently and sensibly has held that the mere fact that symptoms first occur at the time of an injury is not sufficient, without a supporting rationale, to demonstrate that symptoms occurring a decade later are causally related to the prior injury. *Ibid.* Nor does Dr. Simon's November, 1989, report create a genuine disagreement; while he noted that petitioner had "cervical discogenic abnormalities beyond degenerative changes," he nowhere suggested that those abnormalities were the result of a 1982 or 1985 soft-tissue strain. See App., *infra*, 16a.

an intent to preclude review from the statutory structure). This Court has never suggested that express statutory language is itself insufficient to preclude judicial review, and in fact has recognized the opposite. See *Board of Governors of the Fed. Reserve Sys.* v. *MCorp Fin., Inc.*, 502 U.S. 32, 44 (1991) (statute providing that "[n]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any [Board] notice or order under this section" provides the "clear and convincing evidence" of congressional intent sufficient to preclude judicial review).[8]

---

[8] Petitioner argues (Pet. 11) that when this Court "has shut off review, it has been careful to note that alternative remedies existed for judicial relief." That is incorrect. See, *e.g.*, *Fausto*, 484 U.S. at 455 (no judicial action for backpay for federal employee who has no remedy under Civil Service Reform Act). It is well established that "[t]he United States is not, by the creation of claims against itself, bound to provide a remedy in the courts. It may withhold all remedy or it may provide an administrative remedy and make it exclusive, however mistaken its exercise." *Dismuke* v. *United States*, 297 U.S. 167, 171-172 (1936) (citation omitted). Accordingly, the courts of appeals have uniformly recognized that Congress has authority to preclude judicial review of FECA claims. See *Soderman* v. *Civil Serv. Comm'n*, 313 F.2d 694, 695 (9th Cir. 1962) (citing additional cases), cert. denied, 372 U.S. 968 (1963); cf. *Czerkies* v. *Department of Labor*, 73 F.3d 1435 (7th Cir. 1996) (en banc) (courts of appeals and government have construed FECA not to prohibit review of substantial claims of constitutional violations); note 2, *supra* (noting that petitioner does not assert a constitutional violation before this Court). For similar reasons, petitioner's reliance (Pet. 9) on *Johnson* v. *Robison*, 415 U.S. 361 (1974), and *Traynor* v. *Turnage*, 485 U.S. 535 (1988), is misplaced. In those cases, the Court concluded that a statute barring judicial review of administrative decisions "on any question of law or fact *under any law administered by the Veterans' Administration*," 38 U.S.C. 211(a) (1970) (emphasis added), does not prohibit review of the constitutionality of the statute itself, *Johnson*, 415 U.S. at 373, or a claim that agency rules violate

Petitioner also argues that FECA's prohibition against judicial review of "[t]he action of the Secretary or [her] designee in allowing or denying a payment," 5 U.S.C. 8128(b), does not prohibit review of the Secretary's "actions in issuing rules and policies that fundamentally change the meaning and effect of statutory provisions." Pet. 8. Here, however, petitioner is not asking for mere review of a rule or policy statement. She seeks a declaration that the Secretary's action in terminating her benefits is not permitted by FECA and an injunction requiring the Secretary to restore benefits. See Pet. App. 36a. In other words, she seeks review of the application of the Secretary's policy to her claim for benefits, conduct that clearly qualifies as an "action of the Secretary * * * in allowing or denying a payment" within the meaning of 5 U.S.C. 8128(b).[9]

3. Petitioner also asks this Court to consider whether the Secretary's construction of 5 U.S.C. 8123(a) violates a clear statutory mandate. There is no division in circuit authority on the meaning of Section 8123(a); the court of appeals did not address that question; and the Secretary's construction of that

---

another statute, such as the Rehabilitation Act of 1973, 29 U.S.C. 794, that is not "administered by the Veteran's Administration," see *Traynor*, 485 U.S. at 541, 543-544. Petitioner here does not challenge the constitutionality of FECA, but rather claims that the Secretary misconstrued FECA, the very statute the Secretary is charged with administering.

[9] Moreover, the premise of petitioner's argument would "distort[] the statute" by creating "the absurd result of permitting a court to strike down a policy statement of the Secretary, notwithstanding the court's inabiiity to review any subsequent individual adjudications for conformance with its policy decision." *Paluca*, 813 F.2d at 527.

provision is in any event correct (see pp. 12-14, *supra*). Accordingly, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

HENRY L. SOLANO
Solicitor of Labor
ALLEN H. FELDMAN
Associate Solicitor
EDWARD D. SIEGER
Attorney
Department of Labor

MARCH 2000

APPENDIX A

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

IN THE MATTER OF CLEOPATRA MCDOUGAL-SADDLER AND U.S. POSTAL SERVICE, POST OFFICE, PHILADELPHIA, PA.

Docket No. 95-2634; Submitted on the Record; Issued March 20, 1996

DECISION AND ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether appellant's disability related to her May 8, 1982 and April 5, 1985 employment injuries ended by September 20, 1992.

On May 14, 1982 appellant, then a 39-year-old distribution clerk, filed a claim for an injury to her back, upper neck, and shoulders sustained on May 8, 1982 by handling trays of mail. Appellant stopped work on May 11, 1982 and received continuation of pay from that date until June 24, 1982, after which the Office of Workers' Compensation Programs began payment of compensation for temporary total disability.

Beginning August 1982, appellant was treated by Dr. David S. Schwartz, a Board-certified internist and cardiologist, who diagnosed cervical and lumbosacral strains and indicated that she was totally disabled. X-

rays of the cervical and lumbosacral spine and the right shoulder on June 14, 1982 showed no bony traumatic changes. In a report of a fitness-for-duty examination done on November 3, 1982, Dr. Henry S. Wieder, Jr., a Board-certified orthopedic surgeon, stated that appellant's cervical and lumbosacral strain were precipitated by her May 8, 1982 injury but were perpetuated by her obesity, faulty posture and body mechanics.

In a report dated December 14, 1983, Dr. Schwartz stated that appellant had experienced persistent and incapacitating neck and low back pain since her May 1982 injury. The Office referred appellant to the Pain Control Center of Temple University, where Dr. Edward J. Resnick, a Board-certified orthopedic surgeon, stated in a March 9, 1984 report that her objective findings were insufficient to correlate with her apparent degree of disablement, and diagnosed strains of the neck and back from history, exogenous obesity with possible postural musculo-ligamentous back strain and probable chronic pain syndrome. Upon appellant's discharge from this inpatient program from August 6 to 24, 1984, Dr. Resnick stated that appellant's level of pain had not changed but that she was much better able to control it and function with it.

After a fitness-for-duty evaluation on February 21, 1985 by Dr. Eugene L. Thomas of the employing establishment, the employing establishment offered and appellant accepted a reemployment offer as a distribution clerk with use of a high-back chair, no reaching above the shoulder, and no lifting, pushing, or pulling over 15 pounds. Appellant returned to work on March 31, 1985.

Appellant again stopped work on April 5, 1985. On April 8, 1985 she filed a claim for a recurrence of dis-

ability due to her May 8, 1982 employment injury. Appellant stated that on April 5, 1985, after casing mail for two hours, she began to feel sharp pain in the right side of her neck, which extended to her right shoulder and arm and to her entire back as she continued to work.

Dr. Schwartz examined appellant on April 6, 1985, diagnosed cervical and lumbar strain, and indicated that appellant was totally disabled.

By letter dated April 29, 1985, the Office advised appellant that the April 5, 1985 incident constituted a new injury, for which she should file a claim. On May 7, 1985 appellant filed a claim for a traumatic injury to her neck, shoulders, and upper and lower back sustained on April 5, 1985 by casing mail. Appellant received continuation of pay from April 6 to May 20, 1985, after which the Office again began payment of compensation for temporary total disability.

In a report dated June 17, 1985, Dr. Schwartz diagnosed cervical radiculopathy. In a report dated May 22, 1986, Dr. Schwartz diagnosed chronic pain syndrome including chronic lumbosacral strain and chronic cervical strain. In a report dated April 10, 1987, Dr. Schwartz stated:

> "The diagnosis is chronic cervical strain and chronic lumbosacral strain, with occasional radiculopathies. The clinical course over the last several months has been of intermittent worsening, whereby the patient finds herself mostly needing to be at complete bed rest. . . . [Appellant's] symptoms first started on May 8, 1982, and though I did not see her then, her history includes the pain in her low back and

neck starting while at work pulling heavy mail through a chute and tossing it in a bin. At this point, so many years later, we have to assume that she has chronic pain syndrome secondary to her initial work injury. Because of chronic debilitating pain and limited range of motion due to muscle stiffness and spasm, despite intensive physical therapy and medication, [appellant] is totally disabled from work at this time and for the near indefinite future."

In a report dated May 4, 1987, Dr. William H. Simon, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion, diagnosed cervical and lumbar discogenic syndrome with cervical and lumbar nerve root irritation. Dr. Simon concluded:

"Her present findings are those of cervical and lumbar discogenic syndrome due to early degenerative disc disease in the cervical and lumbar spine. This is indicative of a genetic predisposition to degenerative disc disease and is not in my opinion due to any specific incidents of trauma occurring at work."

* * *

"There is no evidence that she sustained any acute injury that is responsible for this but that she has a slowly developing degenerative condition which limits the amount of work that she can do. She will have to decide whether she wishes to bear with the pain and continue her work or whether she wishes to retire from the work force."

On December 31, 1987 the Office notified appellant of the proposed termination of her compensation on the basis that her disability resulting from her employment injuries had ceased. Appellant submitted a report dated February 16, 1988 from Dr. Schwartz stating that her symptoms were "specifically due" to her May 8, 1982 injury, and that her April 5, 1985 injury "added to her previous cervical and lumbosacral strain." In a report dated April 28, 1988, Dr. Robert M. Glazer, a Board-certified orthopedic surgeon to whom Dr. Schwartz referred appellant, diagnosed chronic musculoskeletal pain syndrome, and stated that appellant's "extensive areas of pain complaint would be inconsistent with any of the discogenic or nerve root problems with which I am familiar," and that "[a]ny usual strain or sprain or soft tissue injury should have healed long ago. Therefore, it is my opinion that the present symptoms are most likely nonorganic in origin. Whether this is a conscious or unconscious situation, I am not able to say."

By decision dated December 19, 1988, the Office terminated appellant's compensation on November 20, 1988 on the basis that the weight of the medical evidence established that her disability from her employment injuries ceased by that date.

Appellant requested a hearing, and an Office hearing representative, by decision dated February 21, 1989, found that appellant was not afforded due process, as she was not provided with a copy of Dr. Simon's May 4, 1987 report, despite her request for it. The Office hearing representative remanded the case for reinstatement of compensation, and, as Dr. Simon's evaluation was almost two years old, for a reevaluation by Dr. Simon.

In a report dated October 25, 1989, Dr. Simon noted that appellant continued to complain of pain in the neck, shoulder, back, leg and hip "even without working." After describing his findings on physical examination and x-rays, Dr. Simon diagnosed mild degenerative joint disease and intervertebral disc disease of the cervical spine, moderate degenerative joint disease and intervertebral disc disease of the lumbosacral spine, and possible spondylolysis of the lumbosacral spine. Dr. Simon concluded:

> "This patient has had no objective studies to determine an organic basis for her symptoms since 1982. By that I mean none of the records that I have reviewed indicate that she underwent EMG [electromyogram], MRI [magnetic resonance imaging], CAT [computerized axial tomography] scan, myelogram studies. The patient herself states that she has not undergone any of these studies. I do think it is time for us to try and determine if she has any problems that can be identified as cause for her symptoms other than her degenerative changes.
>
> "The only report that I have concerning her condition since I saw her is a report from David Schwartz, M.D. from Philadelphia Health Associates dated April 10, 1987 which gives the diagnosis as 'chronic cervical strain and chronic lumbosacral strain with occasional radiculopathies.'
>
> "This obviously is not an adequate diagnosis to explain what the patient says is continued symptoms since 1982."

* * *

"At the present time, the only findings are those of progressive degenerative changes in her neck and back and these certainly would not be causally related to one episode of trauma occurring in 1982 or in 1985.

"On a subjective basis, the patient says she cannot do her work. I can not find any objective reasons why she could not return to work. The degenerative changes in her neck and back may be causing her symptoms but there is no evidence that she has a disc herniation or fracture or dislocation or serious lumbar stenosis problem that would functionally incapacitate her."

At Dr. Simon's request, Dr. Michael L. Brooks, a Board-certified radiologist, performed a computerized tomography (CT) scan of appellant's lumbosacral and cervical spine on November 13, 1989. Dr. Brooks stated that this study showed "Broad-based central, with superimposed focal, right-sided mild herniation L5- S1," "Facet degenerative changes without stenosis at L3 through S1," "Small central disc protrusion C4-5," and "Mild left-sided neural foraminal narrowing secondary to small osteophyte C5-6."

In a report dated November 15, 1989, Dr. Simon stated that he agreed with Dr. Brooks' interpretation of the CT scan. Dr. Simon then stated:

"Therefore, we now have objective evidence that this patient has cervical discogenic abnormalities beyond degenerative changes both in her neck and back. These would now allow us to first of all explain some of her subjective symptoms and second, tailor a work program for her which would not put

> extra strain on her neck and back. Any such work program would be one in which she would have to do sedentary work without lifting beyond 10 pounds and she would be allowed to stand and sit as her comfort desired."
>
> * * *
>
> "I do think her discogenic abnormalities in her neck and back are enough to partially disable her but certainly not to totally disable her from returning to some form of work presuming that she is conditioned properly."

An Office medical adviser reviewed the medical evidence on December 19, 1989 and stated that she concurred with Dr. Simon that appellant's continuing complaints were entirely due to preexisting progressive degenerative changes rather than to her employment injuries. In a report dated April 4, 1990, Dr. Schwartz diagnosed chronic cervical strain and chronic lumbosacral strain, and concluded: "Due to the severe pain in the low back and neck with any activity including prolonged standing, walking, minimal lifting, carrying or pushing, [appellant] is totally disabled from work."

The Office found that there was a conflict of medical opinion, and on October 22, 1991 referred appellant, the case record and a statement of accepted facts to Dr. John T. Williams, a Board-certified orthopedic surgeon, to resolve the conflict. In a report dated January 21, 1992, Dr. Williams extensively described appellant's complaints and her findings on physical examination. Dr. Williams then concluded:

"The patient presents to the office today stating that she incurred injury during the course of her employment approximately nine years ago, in 1982. She states that she was working over head dispatching mail in what she called a 'speed element.' She states that she began to experience discomfort in her back and neck. This type of injury is a pull-plus stress fatiguing soft tissue injury which is self-resolving. She stated that she returned to work approximately three years later in a light-duty capacity and she states that she has a recurrence of her discomfort and she has been out of work ever since.

"She states that she had diagnostic studies performed in November 1989 and we obtained faxed reports of the CT scan of the cervical and lumbar spine. These findings are on the basis of degenerative pathology in her neck and back. The patient is a 48-year-old female and these changes are compatible with degenerative pathology: i.e., a broad based central, with superimposed focal right-sided mild herniation at L5, S1 with facet changes all the way from L3 through S2. In the cervical spine there is evidence of a small central disc protrusion at C4, C5 and mild left-sided neural foraminal narrowing secondary to small osteophytes.

"These changes are compatible with the patient's age and with degenerative pathology and they were not caused by a work-related injury of 1982 or aggravated by the incident in 1985. The mechanism of injury does not correlate to the findings on the CT scans. The mechanism of injury was a soft tissue

self-resolving type of muscle sprain strain or ligamentous sprain.

"On my physical examination today there are no positive objective findings to correlate to her complaints. I see no residual pathology as it relates to the injury of 1982 or 1985. I feel that she has recovered to the extent that she is able to be gainfully employed. She has degenerative changes in her cervical and lumbar spine which are compatible with her age and her type of body build. She is obese.

"I feel that she is able to resume her normal duties without any restrictions. If I were to place any restrictions on this patient they would be on the basis of the degenerative pathology which obviously preexisted the work-related injury of 1982. The restrictions would be related to the degenerative changes in her cervical and lumbar spine."

In a report dated March 4, 1992, Dr. Williams stated that he had now reviewed the medical records the Office provided to him. Dr. Williams stated:

"[T]his degenerative pathology [in appellant's lumbar and cervical spine] is part and parcel of the normal aging process and has been aggravated by the patient's weight. Since the day of her accident she has been carried with a diagnosis of a cervical and lumbosacral sprain. These types of sprain strains are of a temporary and transitory nature and are self-resolving. The work-related incident may have aggravated the preexistent pathology but again on a temporary and transitory nature which

resolved leaving her with her preexistent pathology."

After reviewing reports of x-ray findings from 1982, 1984 and 1987, Dr. Williams stated:

"These studies were normal in 1982 and in 1984. Three years later in 1987 we see changes.

"The patient had not been working during this interval so there is no work-related trauma that produced the findings noted on x-rays in 1987. So it was on the basis of the normal wear and tear that she began to show signs of degenerative pathology in 1987."

Dr. Williams then reviewed the findings of the 1989 CT scan and stated:

"So what we are seeing here is the progression of degenerative joint and degenerative disc disease over a period of approximately seven years secondary to the normal wear and tear on the body and the aging process.

"The work-related injury did not cause the degenerative pathology first noted in 1987."

On July 10, 1992 the Office notified appellant of the proposed termination of her compensation on the basis that the medical evidence indicated no continuing disability as a result of her work injuries. Appellant submitted a report dated May 28, 1992 from Dr. Schwartz, who described her symptoms and findings on physical examination, and stated: "[Appellant's] medical condition was a work-related injury and, since she has

essentially never recovered after that injury, this still must be considered a work-related disability."

By decision dated September 2, 1992, the Office terminated appellant's compensation on September 20, 1992 on the basis that the weight of the medical evidence, represented by the reports of Dr. Williams, the impartial medical specialist resolving a conflict of medical opinion, established that the effects of appellant's April 5, 1985 and May 11, 1982 injuries had ceased.

Appellant requested a hearing before an Office hearing representative, which was held on September 23, 1993. Appellant described her two employment injuries and their sequelae, and testified that her back pain had never stopped since these injuries and that she was unable to work due to pain.

By decision dated November 24, 1993, an Office hearing representative found that the opinion of Dr. Williams, the impartial medical specialist resolving a conflict of medical opinion, established that the effects of appellant's May 11, 1982 and April 5, 1985 injuries had ceased by September 20, 1992.

Appellant requested reconsideration, and submitted an October 13, 1993 report from Dr. Philip J. Spinuzza, an osteopath, diagnosing chronic pain syndrome, deconditioning and obesity. Dr. Spinuzza stated, "Typically her pain is aggravated by mechanical activity and relieved by recumbency."

By decision dated March 25, 1994, the Office found that the additional evidence was not sufficient to warrant modification of its prior decisions.

By letter dated February 27, 1995 appellant, through her attorney, requested reconsideration, contending that Dr. Williams was not an impartial medical specialist entitled to special weight, as Dr. Simon's November 15, 1989 report did not conflict with the conclusions of Dr. Schwartz but rather agreed with them. Appellant also contended that Dr. Williams' report was "based upon what are now improper leading questions in that there was never a conflict of medical opinion," that Dr. Williams did not review the results of the November 13, 1989 CT scan, and that it was improper for Dr. Williams to review appellant's medical records after his examination and initial report.

By decision dated June 6, 1995, the Office found that the argument submitted was insufficient to warrant modification of its prior decisions.

The Board finds that the weight of the medical evidence establishes that appellant's disability related to her May 8, 1982 and April 5, 1985 employment injuries ended by September 20, 1992.

The Board has stated that the weight of medical evidence is determined by its reliability, its probative value, its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the doctor's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the doctor's opinion are factors which enter into such evaluation.[1]

---

[1] *Melvina Jackson*, 38 ECAB 443 (1987); *Naomi A. Lilly*, 10 ECAB 560 (1959).

In the present case, the reports from Dr. Williams, a Board-certified orthopedic surgeon to whom the Office referred appellant, constitute the most reliable and probative evidence on the question of whether appellant's disability in 1992 continued to be related to her May 8, 1982 and April 5, 1985 employment injuries. Dr. Williams reviewed the prior medical evidence, reported findings of an extensive examination of appellant, and, most importantly, provided convincing rationale that appellant's continuing disability was not related to her employment injuries. Noting that x-ray studies in 1982 and 1984 were normal but that 1987 x-rays showed degenerative changes, Dr. Williams stated, "The patient had not been working during this interval so there is no work-related trauma that produced the findings noted on x-rays in 1987. So it was on the basis of the normal wear and tear that she began to show signs of degenerative pathology in 1987." Additional rationale by Dr. Williams includes: "The mechanism of injury does not correlate to the findings on the CT scans,"[2] that the "degenerative changes in her cervical and lumbar spine . . . are compatible with her age and her type of body build," and that the "degenerative pathology . . . obviously preexisted the work-related injury of 1982." Dr. Williams' opinion is bolstered by that of another Board-certified orthopedic surgeon, Dr. Glazer, who concluded that appellant's strain or sprain, the condition accepted by the Office, resolved long ago.

In contrast with the reports of Dr. Williams, the reports from appellant's attending physician, Dr. Schwartz, are not based on a complete history, as they

---

[2] Earlier in his January 21, 1992 report, Dr. Williams makes it clear that he reviewed the November 1989 CT scans.

do not show any awareness of the results of the November 13, 1989 CT scan.[3] Unlike Dr. Williams, Dr. Schwartz, a Board-certified internist and cardiologist, is not a specialist in the appropriate field of medicine.[4] The only rationale that Dr. Schwartz provided for his opinion that appellant had not recovered from her employment injuries by 1992 was that her pain began at the time of her May 8, 1982 employment injury and had not resolved. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relation.[5] For these reasons, the reports of Dr. Schwartz are entitled to less probative value than those of Dr. Williams.

Appellant is correct in arguing that Dr. Williams was not an impartial medical specialist because there was no conflict of medical opinion at the time of the Office's referral to Dr. Williams.[6] The reports of Dr. Simon, the Board-certified orthopedic surgeon whose second opinion was the basis of the Office's declaration of a conflict of medical opinion, were not sufficient to create such a conflict. In his report dated October 25, 1989, Dr. Simon stated that appellant's "only findings are

---

[3] Reports based on an incomplete or inaccurate history are of reduced probative value. *James A. Wyrich*, 31 ECAB 1805 (1980).

[4] The opinions of physicians who have training and knowledge in a specialized field have greater probative value concerning medical questions peculiar to that field than the opinions of other physicians. *Elmer L. Fields*, 20 ECAB 250 (1969).

[5] *Thomas D. Petrylak*, 39 ECAB 276 (1987).

[6] There is, however, no evidence in the case record to support appellant's contention that the Office asked Dr. Williams leading questions.

those of progressive degenerative changes in her neck and back and these certainly would not be causally related to one episode of trauma occurring in 1982 or in 1985" and that "there is no evidence that she has a disc herniation or fracture or dislocation or serious lumbar stenosis problem that would functionally incapacitate her." In his report dated November 15, 1989, Dr. Simon stated that a CT scan done on November 13, 1989 showed "objective evidence that this patient has cervical discogenic abnormalities beyond degenerative changes both in her neck and back." While Dr. Simon did not attribute these "discogenic abnormalities beyond degenerative changes" to appellant's employment injuries, his November 15, 1989 report casts serious doubt on the conclusion in his October 25, 1989 report that appellant had only progressive degenerative changes.

Even though the reports of Dr. Williams are thus not entitled to the special weight afforded to the opinion of an impartial medical specialist resolving a conflict of medical opinion,[7] his reports can still be considered for their own intrinsic value[8] and can still constitute the

---

[7] In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight. *James P. Roberts*, 31 ECAB 1010 (1980).

[8] *See Myrtle C. Pittman, on petition for recon.*, 40 ECAB 880 (1989) for a discussion of the use or exclusion of reports of purported impartial medical specialists where a conflict of medical opinion was mistakenly identified by the Office.

weight of the medical evidence.[9] For the reasons stated above, the Board finds that the reports of Dr. Williams constitute the weight of the medical evidence and are sufficient to establish that appellant's disability related to her May 8, 1982 and April 5, 1985 employment injuries ended by September 20, 1992.

The decision of the Office of Workers' Compensation Programs dated June 6, 1995 is affirmed.

Dated, Washington, D.C.
March 20, 1996

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

---

[9] *See Leanne E. Maynard*, 43 ECAB 482 (1992) (The Board found that a physician's "opinion is probative even though he was not an impartial medical examiner" and that the opinion of this physician and another physician were sufficient to establish causal relation.); *Rosa Whitfield Swain*, 38 ECAB 368 (1987) (The Board found that a physician was improperly designated as an impartial medical specialist, but that his opinion nonetheless constituted the weight of the medical evidence).

APPENDIX B

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

Docket No. 95-2634

IN THE MATTER OF CLEOPATRA MCDOUGAL-SADDLER AND U.S. POSTAL SERVICE, POST OFFICE, PHILADELPHIA, PA

ORDER DENYING PETITION FOR RECONSIDERATION

The Board issued its decision and order in the above-entitled matter on March 20, 1996. The Board found that the weight of the medical evidence established that appellant's disability related to her May 8, 1982 and April 5, 1985 employment injuries ended by September 20, 1992.

Appellant filed a petition for reconsideration. The Director of the Office of Workers' Compensation Programs was served with a copy of appellant's petition, and, in reply, requested that it be denied on the ground that no error of fact or law had been cited. Appellant was served with a copy of the Director's reply, but did not respond within the time allotted.

The Board, having duly considered appellant's petition for reconsideration, finds that it fails to establish any error of fact or law in the Board's March 20, 1996 decision and order warranting further consideration.[1]

---

[1] *See Virginia Faye Gabbert*, 21 ECAB 149 (1969).

Accordingly, IT IS ORDERED that the petition for reconsideration be and it hereby is denied.

Dated, Washington, D.C.

JUN 18, 1996

/s/ DAVID S. GERSON
DAVID S. GERSON
Member

/s/ WILLIE T.C. THOMAS
WILLIE T.C. THOMAS
Alternate Member

/s/ MICHAEL E. GROOM
MICHAEL E. GROOM
Alternate Member

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-1068

CLEOPATRA MCDOUGAL-SADDLER, APPELLANT

v.

ALEXIS M. HERMAN, SECRETARY,
U.S. DEPARTMENT OF LABOR, APPELLEE

PRESENT: MCKEE, RENDELL, *CIRCUIT JUDGES* AND
DEBEVOISE, *SENIOR DISTRICT JUDGE*[*]

ORDER

It is hereby ORDERED that the slip opinion filed in this case on November 17, 1998 be vacated.

By the Court,

/s/ signature illegible

Circuit Judge
Hon. Theodore A. McKee

Dated: FEB 24 1999
DR/CC: JP2, NMO, KBK

---

[*] Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, sitting by designation.